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IN THE MATTER OF

SHARYN ERICKSON,
Complainant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4, ATLANTA, GEORGIA & EPA INSPECTOR GENERAL,
Respondents

APPEARANCES

Edward Slavin, Jr.,
On behalf of the Complainant

Karol Smith
Sonya Cromwell
On behalf of Respondent U.S. Environmental Protection Agency, Region 4, Atlanta

Eric Hanger
On behalf of Respondent EPA Inspector General

Before: Clement J. Kennington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

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I. OVERVIEW

This case arises pursuant to the employee protection provisions of the Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-9(i); Water Pollution Control Act (WPCA) 33 U.S.C. § 1367; Solid Waste Disposal Act (SWDA) 42 U.S.C. § 6971; Clean Air Act (CAA) 42 U.S.C. § 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9610. Multiple complaints were filed by Sharyn Erickson (Complainant) against the United States Environmental Protection Agency, Region 4, Atlanta, Georgia (Respondent EPA or EPA), and the Environmental Protection Agency Office of the Inspection General (Respondent OIG, or OIG). The parties could not resolve the matter administratively. Litigation in this matter was protracted and bitter, and the Court was prepared to hear oral arguments and receive evidence on reciprocal motions for attorney disqualification when the parties resolved their differences and decided to proceed with the case on the merits. A twelve day formal hearing was held in Atlanta, Georgia on May 6-10, June 3-7, and June 17-18, 2002, at which sixteen witness testified and contributed to over 3,000 pages of transcript.[1]

Complainant, a former Contract Officer at EPA Region 4, learned in 1993 that a particular contract specification utilized in superfund bioremediation contracts created an impossibility of performance because existing technology could not expunge toxic contaminants to the specified detection levels. Based on the manner in which she performed her work, Complainant became embroiled in conflicts with her managers,[2] who detailed Complainant away from contract work, and

[1] The parties filed post hearing briefs. Based on the quality of the work, I could tell that Respondent EPA and Respondent OIG took the time to submit a quality product. By contrast, Complainant's brief, submitted in 82 numbered paragraphs, was difficult to read and its lack of clarity and organization obfuscated Complainant's strongest arguments. Indeed, after reviewing nearly 250 pleadings and issuing scores of orders in this case, I find that the conduct of Complainant's counsel unduly prolonged these proceedings and wasted judicial resources.

[2] Respondent OIG's organizational structure involved in these proceedings consisted of the Office of the Inspector General, Office of Investigations, headquartered in Washington, D.C., with regional offices in Atlanta, Georgia. OIG personnel playing significant roles in this case are:

she filed a series of labor grievances. One of Complainant's details entailed reviewing all contracts form EPA Region 4 to make sure the impossibility of performance issue she identified would not arise in the future. In February 1995, however, an EPA contractor contacted Complainant and informed her that a contract open for bid in EPA Region 6, contained a similar performance specification and the contractor asked Complainant to contact Region 6 to remedy the problem.

While at home, Complainant contacted Region 6 on behalf of the contractor without utilizing the established chain of command. Concerned about possible improprieties, management officials from Region 4 referred Complainant's actions first to the Office of Regional Counsel and then to the OIG for an investigation. The OIG determined there was no basis for criminal prosecution and based on the investigative report, Region 4 determined there was no basis for administrative discipline. Meanwhile, management moved Complainant out of her career field into the Information

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Emmett Dashiel, Jr, Deputy Assistant Inspector General; Alverdes Cornelious, Supervisory Special Agent; Kenneth Wilk, Special Agent; Eugene P. Mullis, Special Agent; Gary Fugger, former Desk Officer; Edward Geosky, Inspector General for the Financial Audit and Evaluation Resource Center and Acting Divisional Inspector General for the Headquarters Audit and Evaluation Resource Center.

Also involved is the Office of Policy and Management located in EPA Region 4, Atlanta, Georgia. The Office of Policy and Management is further divided into the Information Management Branch and the Grants and Procurement Branch, among others. Within the Information Management Branch is the FOIA office and Information Resources. Within the Grants and Procurement Branch is the Grants Section, IAG and Audit Management Section, and the Procurement Section. The pertinent personnel for the Office of Policy and Management are: Stanley Meiberg: Deputy Regional Administrator; William Waldrop: Former Acting Assistant Regional Administrator (Sept. 1993-Sept. 1995); Former Chief of Human Resource Management (1982-1993); Current Special Assistant to Michael Peyton; Michael Peyton, Head of the Office of Policy and Management; Ron Barrow, Head of the Information Management Branch; Jack Sweeny, Former Head of the Information Management Branch; Rebecca Kemp, Head of the FOIA Section within the Information Management Branch;
Matthew Robbins, Head of Grants and Procurement Branch; Ed Springer, Head of the Grants Section; Keith Mills, Head of the Procurement Section; Jane Singly, Former head of Procurement Section Deborah Maxwell, Former Head of Grants and Administration Branch;

Also playing a role in the proceedings was the Office of Regional Counsel , EPA Region 4, Atlanta, GA, and other EPA personnel and EPA contractors. Those personnel are: Phyllis Harris, Regional Counsel; Leslie Bell, Assistant Regional Counsel; John Glasser, EPA Risk Reduction Engineering Lab; Robert Place, Retired ACS Contractor; Robert Tyndall, Former FBI Special Agent, U.S. Dept. of Housing and Urban Development, former OIG Criminal Investigator, former EPA OIG Special Agent.

Management Branch at Region 4, and management made her reassignment permanent in light of the OIG investigation without informing her of the results of the OIG's investigation or the administrative review. Complainant had sent two Freedom of Information Act (FOIA) requests to the OIG, who promised that it would release the investigative report one the investigation was completed and several Congressmen and Senators submitted inquiries on her behalf. Although Complainant submitted her two FOIA requests in 1995, it was not until October 1998 that the OIG complied with her request. Without any information from the OIG or her supervisors, Complainant thought that the investigation was still pending when the OIG had officially closed her case in May 1996.

Management transferred Complainant to a position in the Information Management Branch involving technical knowledge, which she was not qualified to perform, but her immediate supervisor modified the position description so that she could perform her duties provided she received cooperation from numerous lower level work assignment managers. The work assignment managers, however, refused to work with Complainant, and as a result EPA Region 4 became a dysfunctional organization from the point of view of private computer service contractors. Management knew of the hostility directed toward Complainant from the work assignment managers but did not effectively remedy the situation. Complainant attempted to find other work. For a brief time Complainant worked in the FOIA office but management terminated her work there after she deviated from her instructions and broke the chain of command. Complainant also leaked information to Congress concerning the destruction of e-mail that potentially violated FOIA. Additionally, Complainant attempted to reenter her career field in the Procurement Section by applying for positions through competitive process. Although she was a highly qualified candidate, Complainant's former managers refused to select her for any position.

II. BACKGROUND

A. Prior Work History

Complainant received her bachelor of science in psychology from Michigan State University. (Tr. 2092-93). Additionally, Complainant did graduate work in clinical psychology at Trinity University in San Antonio, Texas, while obtaining her masters degree in criminal justice. (Tr. 2092-93). Complainant is also a member of Mensa, an organization open exclusively to those with an intelligence quota in the top two percentile. (Tr. 2154).

On October 23, 1977, Complainant started her federal employment in the prison system doing probationary work. (Tr. 2091-92). During her four years in the federal prison system, Complainant won an Equal Employment Opportunity lawsuit based on her gender. (Tr. 2092). On January 7, 1982, after taking the civil service examination, Complainant left the federal prison system to work at Robins Air Force Base in Georgia, as a contract specialist. (Tr. 2093). Eventually, Complainant began to work on large dollar contracts involving Congress and large multinational corporations. (Tr.

2094-95). Complainant liked her job at the Air Force, but was not happy about the location of Robins Air Force Base and after Complainant neared the end of her learning curve on that job she decided to transfer to the EPA in January 1989. (Tr. 2096-97).

Keith Mills, a co-worker of Complainant's at Robins Air Force Base, also transferred to the EPA at the same time as Complainant and the two became good friends. (Tr. 1474-75). Complainant even entrusted Mr. Mills with both the key to her home and her home security codes. (Tr. 1475, 2112). While Complainant began work for the EPA as a GS-12, Mr. Mills began work as a GS-9. (Tr. 1475). Mr. Mills testified that during the time they worked together, Complainant was helpful, knowledgeable, well-informed, and an excellent writer.[3] (Tr. 1481).

Complainant's first four years of work at the EPA were enjoyable, but with fewer contracts to manage than the Air Force, Complainant was required to adapt to a style of contracting requiring greater attention to small or inconsequential details. (Tr. 2097-98). For her ability to streamline the contractor selection process at the EPA, during her first years of employment, Complainant received an award on the recommendation of her supervisor, Jane Singly. (Tr. 2098-106; CX 27 A, p. 1). Complainant also received awards for her work on procuring innovative technologies and for the quality of her contracting work on the Southeastern Superfund Site. (Tr. 2106-07). Additionally, Complainant undertook many responsibilities as the point-of-contact personnel on many issues in the Procurement Section. (CX 27 D, p. 1; K-L; CX 27, U-W; CX 27 Z, p. 1; CX 43).

Meanwhile, Mr. Mills advanced through the ranks, eventually becoming a GS-14 and Chief of the Procurement Section. (Tr. 1476). During Mr. Mills's advancement, he competed with Complainant for the same supervisory promotion in November 1992. (Tr. 2113). Management selected Mr. Mills over Complainant. (Tr. 2113). Complainant testified that she had no hard feelings toward Mr. Mills[4] for being chosen ahead of her because he was not the selecting official for his own promotion. (Tr. 2113).

Complainant related that once Mr. Mills was chosen as a supervisor, their relationship began

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[3] Complainant's performance evaluations reveal that in during the period from January to September 1989, she "exceeded expectations" when her work was reviewed by Jane Singly. (EPA 91, p. 1). Complainant's evaluations were on a point scale: 100-199 - Unsatisfactory; 200-299 - Minimally Satisfactory; 300-399 - Fully Successful; 400-449 - Exceeds Expectations; 450-500 - Outstanding. (EPA 91, p. 1). Complainant's score in 1989-90 was exactly four hundred. *Id*. Ms. Singly noted that Complainant consistently provided very thorough, timely and accurate information and did an excellent job at advising management of issues that have a wider impact. (EPA 91, p. 15).

[4] Mr. Mills testified that Complainant was visibly upset when he won the competition for the promotion because Complainant felt she was more qualified. (Tr. 1588-89, 1596). Once he became Complainant's supervisor, he noticed that Complainant's attitude toward him changed in that discussions escalated to a different level than when they were co-workers. (Tr. 1595-96).

to deteriorate because Mr. Mills felt that he had to establish his authority. (Tr. 2114). Complainant was accustomed to working with massive volumes of contracts in the Air Force, and she objected to Mr. Mills's interference because she did not want to "waste time" correcting minor details. (Tr. 2114-16). Complainant took umbrage when Mr. Mills required her to write and rewrite the same memos; especially since she was working from 7:30 a.m. to 9:30 p.m. due to her extra responsibilities as the point-of-contact personnel. (Tr. 2114). Despite her disagreements with Mr. Mills, Complainant never received any discipline and she had never been disciplined in her history of federal service. (Tr. 2111).

As a GS-14, Mr. Mills currently oversees about twelve employees and the purchase of architect/engineering services to support the Superfund program. (Tr. 1476). The value of contracts under Mr. Mills's supervision exceed 500 million dollars and the primary contractors are large multi-national construction companies. (Tr. 1479). Work is very technical and involves a number of sophisticated legal issues. (Tr. 1480).

B. Southeastern Contract

In the course of her duties as a contracting officer, Complainant astutely identified an impossibility of performance issue in a Superfund contract to cleanup the Southeastern Wood Preserving facility in Canton, Mississippi, which involved the contractor OHM. (EPA 1, p. 1). In identifying the impossibility of performance issue, Complainant worked closely with Dr. Glasser, a research scientist with the EPA, who has a strong background in bioremediation. (Tr. 1808-09). Specifically, the problem with the Superfund contract was that the performance specifications called for a bio-slurry[5] method of cleanup and the desired level of cleanup, which was obtained by the use of faulty analytical methods, could not be achieved with existing technology. (Tr. 1818-1822). Complainant and Dr. Glasser developed a workable set of parameters so that treatment of the site could continue and Complainant completed what she thought was the only contract reformation ever done at EPA Region 4 so that the performance standards could be adjusted.[6] (Tr. 2118; 1825).

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[5] Bioremediation concerns the use of metabolic activity to change the chemical composition in organic pollutants making them less toxic. (Tr. 1810). A slurry is a contaminated solid that is put through a water phase to break down the clumping of soils and to expand the soil's surface area before the addition of a bioremediation contact mechanism. (Tr. 1813).

[6] Regarding Complainant's involvement Dr. Glasser stated:

> I think her - - her conceptualization and understanding of the technical issues went well beyond anything that I expected form someone in the position she was holding
>
> I mean, I - - she was asking questions that I would find myself asking, an to me, that - - it was just a phenomenal set of circumstances to find someone, first of all, that interested to get - - to really delve into the depths of the problem, and to

By confecting the Southeastern contract reformation, Complainant helped to settle a claim by OHM against the government because the government was responsible for the impossibility of performance issue. (Tr. 2118-19; CX 28 M, p. 1). Complainant estimated that OHM ended up expending over three million dollars[7] of their own money to finish the job. (Tr. 2120). Complainant related that OHM was willing to incur the additional costs in this fixed price contract because she convinced OHM that the performance specifications were a mutual mistake, OHM did not want to alienate the EPA by not finishing the project, and because OHM wanted to use its involvement in the first ever bioremediation project for publicity. (Tr. 2121-22). Nonetheless, EPA spent an additional $500,000 of its own funds because it could not meet the Land Ban Standards related to the site under the reformed contract. (Tr. 2121-2122). Dr. Glasser testified that Complainant's actions saved the government money, and he recommended to others that Complainant be contacted for her experience at the Southeastern site.[8] (Tr. 1841-43). Complainant also asked OHM to notify her if it ever came across the same impossibility of performance issue in other EPA contracts.[9] (Tr. 2531-32).

Complainant's good work in reforming the Southeastern contract, in saving the government money, and in finding a solution whereby the contaminated site could continue to be cleaned was overshadowed by disputes between Complainant and Mr. Mills over how to perform job tasks. On June 17, 1993, Mr. Mills made a handwritten notation[10] that Complainant had spoken to him

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> ask questions that really drove to the point of saying, "I really understand the problem. How do we go form this step to the next step to make this system work."

(Tr. 1831).

[7] OHM estimated that at project completion it would have expended greater than one million dollars in excess of its original bid. (CX 29 J, p. 2).

[8] The nearly $500,000 increase in funds was necessary because "capping" of the contaminated soil to prevent leakage changed the amount of funds that would be necessary to meet the Land Ban Standards. (CX 11 C(14), p. 1-2; CX 27 F, p. 1).

[9] An EPA bulletin was disseminated detailing events in the Southeastern contract in an effort to avoid similar problems in procuring innovative technologies at other removal sites. (CX 43).

[10] Mr. Mills made several handwritten notes detailing his interaction with Complainant so that the conversations he had with her would not later be misconstrued. (Tr. 1608; EPA 1, 4, 13, 19-20, 23). Mr. Mills usually typed his documents and he had no explanation as to why these were handwritten. (Tr. 1613). No originals were produced at trial and the handwritten notes were not attached to his responses to Complainant's Fair Labor Relations Act complaints. (Tr. 1613-14). On rare occasions, Mr. Mills testified that he authored similar handwritten documentation on

indicating that she had resolved the impossibility of performance issue with OHM on the Southeastern contract. (EPA 1, p. 1). Complainant also related that she had stayed after hours to assist Dave Caddy, an employee of OHM, in developing a half-million dollar proposal to submit to EPA. (EPA 1, p. 1-2). Complainant testified that the half-million dollar increase in EPA costs in the project was purposefully set at less than $500,000, even though the actual costs may have been more because an adjustment under $500,000 did not require an audit, which was associated with a six month delay, and OHM was willing to absorb the additional costs to finish the project. (Tr. 2125). Mr. Mills testified that as a result of his requests to document the file to support her contract actions in a profit/fee analysis, Complainant became very upset, used inappropriate language, and cursed at him. (Tr. 1482, 1664).

After her conversation with Mr. Mills on June 17, 1993, Complainant wrote an e-mail to Mr. Mills wherein she stated that she was "not so stupid that [she] didn't know that a C.O. has to justify adding almost a half a million dollars to a fixed price contract." (EPA 2, p. 1). Complainant further stated that she was routinely "bombarded with insulting comments" over the past several years such as Mr. Mills's admonition to justify the extra costs. (EPA 2, p. 1). At 3:00 p.m. that afternoon, Mr. Mills demanded that Complainant provide him with a chronological listing of events which prevented completion of the OHM contract, a current status report, the contract file, and any related administration files, all to be on his desk by June 28, 1993. (EPA 3, p. 1; EPA 5, p. 2). On the morning of June 18, 1993, Mr. Mills asked Complainant whether she had lost her objectivity on the Southeastern contract, and he stated that he was getting involved to oversee what was happening.[11] (EPA 4, p. 1-2). Mr. Mills noted that Complainant resented his involvement and when he asked for documentation, Complainant refused to provide it citing the need to respond to other work-related matters. (EPA 4, p. 2-3).

Despite Complainant's protests over Mr. Mills's involvement in the file and the need for a further documentation, Complainant attempted to comply with Mr. Mills's order. On August 26, 1993, Complainant attached a memo to the Southeastern contract file stating that it was unnecessary to perform a detailed profit objective in accordance with EPA standards because it was patently obvious that the overall contract amount was much less than the maximum allowable under EPA standards. (EPA 12, p. 1). Mr. Mills objected to this profit analysis because it did not contain a detailed analysis or profit objective calculations. (Tr. 2127; EPA 12, p. 1).

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other employees. (Tr. 1609). I find these handwritten notes highly suspicious and afford them little probative value.

[11] Mr. Mills testified that he never accused Complainant of bias or favoritism in regards to OHM but simply spoke about the process and what was involved in the contract file. (Tr. 1657-58). Of particular concern to Mr. Mills was that Complainant related that she was "assisting" OHM submit a contract proposal, and while the contracting officer may "assist" by answering questions, a contract officer should not help the contractor to submit that bid. (Tr. 1718-19).

On September 7, 1993, Complainant lamented that EPA delays in approving the Southeastern contract was causing OHM to loose confidence in the EPA and the delay caused OHM to consider formal litigation. (EPA 14, p. 1). Complainant complied with Mr. Mills's order to detail the profit analysis a second time, but Mr. Mills objected again on the grounds that he wanted the analysis in a memo format. (Tr. 2127). On October 19, 1993, Mr. Mills discussed his review of Complainant's Southeastern contract file and he noted that Complainant became loud, defensive and used profanity, indicating that she would not make the changes that Mr. Mills wanted. (EPA 19, p. 1). Mr. Mills left Complainant's office because he felt that she was on the verge of violence. (EPA 19, p. 2). Complainant then came to Mr. Mills's office stating "what in the hell do you want me to [do] with this damn file?" (EPA 19, p. 2). After a discussion, Mr. Mills agreed to look at the file again to make sure what he indicated was accurate. (EPA 19, p. 2-3).

After reviewing the file, Mr. Mills related to Complainant on October 20, 1993, that she needed to make the correction that he originally requested and while Complainant added profit calculations she did not add any analysis. (EPA 20, p. 1). Specifically, Complainant's analysis did not allow someone who was not familiar with the contract to fully understand what was going on when they looked at her profit/fee calculation. (Tr. 1489). Complainant argued about Mr. Mills's requirements, and as a consequence, Mr. Mills informed her that he was now the contracting officer, and Complainant was demoted to the contracting specialist.[12] (Tr. 1488; EPA 20, p. 1). Mr. Mills returned the file to Complainant for her to prepare the analysis for his signature. (EPA 20, p. 2). Complainant complied a third time by adding an addendum to the cost price negotiation memorandum justifying her detailed calculations. (Tr. 2127).

On October 21, 1993, Complainant sent an e-mail to Mr. Mills informing him that he needed to start form scratch on the Southeastern file because as the contracting officer he should make all the determinations himself. (EPA 21, p. 1). On October 22, 1993, unbeknownst to Complainant, Mr. Mills removed her profit objective addendum, inserted a memo in its place, and signed off on the Southeastern Profit Analysis. (Tr. 2127-28; EPA 22, p. 1; EPA 23, p. 1).

Mr. Feldman, in the EPA's General Counsel's office approved Complainant's calculations and the memo sent by Mr. Mills. (Tr. 1489-91). On November 9, 1993, Mr. Feldman complimented Complainant on doing a good job and stated that it was clear that she put a lot of time into the contract as not a single thing was corrected.[13] (Tr. 2131-32; CX 27 E, p. 1).

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[12] This was the only time that Mr. Mills had to take over a file form another employee. (Tr. 1503).

[13] Complainant's supervisor, Ms. Singly cited to Complainants' "mature judgment and sound decision making capabilities" that she demonstrated on the Southeastern contract and stated that Complainant's documentation on the Southeastern contract was of exceptional quality. (EPA 91, p. 11, 13). During the 1991-92 performance evaluation, Complainant's performance apparently deteriorated as she only received evaluations of "fully successful" when reviewed by Jane Singly. (EPA 93, p. 1, 3). One again, however, Ms. Singly stated that Complainant's efforts in the Southeastern contract demonstrated an excellent grasp of technical issues and demonstrated

After the legal department approved the file, Complainant looked at the file a second time to double check her mathematical calculations. (Tr. 2128). In reviewing the file, Complainant noticed that Mr. Mills had taken her addendum out and done a memo in its place. (Tr. 2128). Discovering that she had made mathematical errors Complainant sent the file back to the legal department and Mr. Feldman simply scratched out Mr. Mills's memo and substituted the one written by Complainant. (Tr. 2128-29). Also, in reviewing the Southeastern file, Complainant noted comments written by her supervisors about her work and Complainant defended her actions on the contract by making notations next to the comments of her supervisors. (EPA 17, p. 1). When these notations were discovered, Sam Jamison met with Complainant and Mr. Mills on May 24, 1994, to admonish Complainant not to add comments to contract review sheets without the reviewer's knowledge.[14] (EPA 43, p. 1; EPA 44, 1-4).

Complainant's meeting with Mr. Jamison and Mr. Mills was quickly followed by an e-mail from Complainant to Mr. Jamison. (CX 26). Complainant argued that his order not to write in the file deprived her of a chance to defend her work in regards to comments that only indicated a reviewer's preference. (CX 26, p. 1). On July 11, 1994, Complainant wrote a memorandum to Mr. Jamison explaining why she struck her name from three documents on a Remedial Oversight Contract solicitation file. (EPA 46, p. 1). Complainant explained that management had obtained her signature and then altered the documents, making changes with which she did not agree. (EPA 46, p. 1). Furthermore, her comments in the Southeastern contract review sheets were merely an accepted practice of responding to an audit review and the comments she inserted did not change the contract. (EPA 46, p. 1-2).

C. Bechtel Contract

Also, in the course of her duties as a contracting officer, Complainant confronted policy issues concerning the Superfund contractor Bechtel, over government indemnification insurance and work at federal facilities that had the potential to create a conflict of interest for Bechtel. Specifically, the government was providing EPA contractors with indemnification insurance on hazardous waste cleanup sites; however, when private companies began to offer such insurance, the government wanted to get out of the insurance business which caused some confusion as to which sites the government was insuring. (Tr. 2140-41; EPA 7, p. 1). The federal facilities issue involved a potential conflict of interest for large contractors, such as Bechtel, who had both multi-million dollar contracts with other federal agencies, which could create hazardous waste, and contracts with the EPA to

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an ability to work closely with program personnel in resolving problems. *Id*. at 2.

[14] Mr. Jamison explained that the contracting officer who prepares the file is legally responsible and the contracting officer cannot have notations in the file of which they are not aware. (EPA 43, p. 1). Complainant had also struck out the name of the contracting officer and inserted her name as the contracting specialist. (EPA 43, p. 1). Mr. Jamison expressed concern that Complainant did not understand the need to follow procedures. (EPA 43, p. 1).

cleanup those hazardous sites or perform oversight work. (Tr. 2142).

On July 28, 1993, Sandra Ogden, area counsel for Bechtel, wrote a letter to EPA Region 9 enclosing a contract modification providing that the federal government would continue to provide indemnity insurance until the parties could reach a revised indemnity agreement. (EPA 7, p. 1). EPA Region 9 responded on August 3, 1993, that Bechtel would be in default if it rejected any work assignment on the basis that the government was not providing the indemnification insurance. (EPA 8, p. 1). On August 13, 1993, Ms. Ogden wrote to Complainant that Bechtel would no longer accept any new assignments until the parties resolved the indemnification issue. (EPA 9, p. 1).

Following the Federal Acquisition Regulations (FAR) that she should try to reach a resolution instead of resorting to court, Complainant reached a resolution with Bechtel on August 17, 1993, which provided that each side would maintain its legal position but in the meantime Bechtel would continue to accept work in Region 4 until the matter was resolved.[15] (Tr. 2147; EPA 11, p. 1). According to handwritten notes written by Mr. Mills, Bechtel sent Complainant a copy of a letter memorializing this agreement seeking Complainant's approval. (EPA 13, p. 1). EPA headquarters approved Complainant's work with Bechtel. (Tr. 2150; ALJ 2). On August 19, 1993, Mr. Mills wrote to Ms. Ogden explaining that a team form EPA headquarters was studying the issue of indemnification and modification of the contract before adopting a unified EPA position. (EPA 10, p. 1). Pending that decision, Mr. Mills indicated that Bechtel could not refuse any work assignments, but nothing prevented Bechtel form asserting its contract interpretation at a later date. (EPA 10, p. 1).

On August 30, 1993, Mr. Mills transferred the Bechtel contract, which Complainant had worked on for two years, to Deborah Davidson, citing three faults with Complainant's handling of the file: 1) Complainant discussed her opinion on indemnification issues with Bechtel - an agency issue that must be coordinated with headquarters; 2) Complainant took a position on indemnification applied in Region 9 and made it apply to Region 4 without any legal opinion; and 3) Complainant negotiated with Bechtel on issues that did not agree with the position taken by EPA headquarters and falsely asserted that EPA Region 9 supported her position. (EPA 13, p. 1-2). In her dealings with Bechtel, Complainant related that she adhered to EPA's official position, and did what was in the government's best interest without benefitting Bechtel. (Tr. 2147, 2151). Complainant related that she had a difficult time making Mr. Mills understand the issues because he kept mixing up the issues of contractor indemnification with a refusal to do work on federal facilities. (Tr. 2139).

On October 7, 1993, Ms. Ogden wrote to Deborah Davidson, now the contracting officer in charge of dealing with Bechtel, relating that Paul Tomiczek, an employee of Bechtel, had signed a modification agreement extending the performance of a Superfund contract pending agreement on the outstanding indemnification issue. (EPA 15, p. 1). Ms. Ogden stated that Mr. Tomiczek only

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[15] Mr. Mills testified that Complainant took a different position with Bechtel than that dictated by Headquarters because Complainant agreed with Bechtel that it did not have to take certain work under the contract. (Tr. 1508-11).

signed the modification because it was presented to him by Complainant and he assumed that Complainant had gotten permission from Bechtel for him to sign. (EPA 15, p. 1). Ms. Ogden admonished that Complainant should not have pressed Mr. Tomiczek to sign without first consulting Bechtel counsel. (EPA 15, p. 1-2).

After Mr. Mills became Complainant's supervisor and after Complainant filed a grievance against Mr. Mills under the Fair Labor Relations Act stemming from their disagreement over the Southeastern contract, Mr. Mills gradually began to take away Complainant's contracts.[16] (Tr. 2138). First, Mr. Mills took Southeastern and that was followed by Bechtel. (Tr. 2139). As a result of her grievance, Complainant testified that things at work became progressively worse. (Tr. 2152-53). On December 2, 1993, Complainant requested a desk audit in an effort to increase her pay scale form a GS-12 to a GS-13. (EPA 39, p. 1). On February 8, 1994, Barbara Boone, Chief of Human Resources Management Branch, denied the requested pay increase finding that Complainant's position did not support a GS-13 level. (EPA 40, p. 1). On May 12, 1994, Mr. Mills assigned a contract Complainant was working on to another employee citing Complainant's temporary assignment to the Grants Section. (EPA 42, p. 1). Complainant was assigned to the supervision of Deborah Maxwell, who found Complainant to be "out of control, always bitter, and always arguing." (OIG 1, p. 4). Complainant asked for another desk audit to try to increase her GS level to 13, but EPA personnel would not give her the increase because Complainant had been removed from much of her contracting work by Mr. Mills. (Tr. 2284). In July 1994, Complainant was officially transferred to the Grants Section to coordinate several task forces to evaluate and streamline EPA Region 4's Office of Policy and Management. (CX 11 C (3)(a), p. 1-2). On September 4, 1994, Complainant's detail was extended to include work on the design and model statements of work, and extended again on November 9, 1994. (CX 11 C (3)(b-c). Ms. Maxwell stated that Complainant's September 1994 detail was intended to remove Complainant from all contracting matters. (OIG 1, p. 4). One of Complainant's tasks in her detail to the Grants Section involved reviewing all the remedial designs in Region 4 to make sure that the same impossibility of performance issue that appeared in the Southeastern contract did not appear in other contracts. (Tr. 2164). Complainant labeled her continuing assignments to the Grants Section "make-work," and after her initial

[16] Once Mr. Mills became her supervisor, Complainant received less favorable performance appraisals. In the 1992-93 performance evaluation, Mr. Mills rated Complainant fully successful with 315 points, specifically stating that the quality of her work was "exceptional," and that she had a good command of grammar with written products that were clear and concise. (EPA 117, p. 2, 14). On October 34, 1994, Keith Mills issued his evaluation of Complainant for the 1993-94 period and issued a rating of "fully successful" assigning Complainant 310 total points. (EPA 94, p. 1-2). Complainant refused to sign the performance agreement. (EPA 94, p. 1). In a letter dated January 26, 1995, Complainant formalized her objections in writing stating that the performance standards were too subjective and based on a supervisor's thinking rather than on her actual performance. (EPA 94, p. 17). Specifically, Complainant alleged that the performance standards measured how much an employee expresses agreement with management rather than anything concrete concerning job performance. (Tr. 2133-34; EPA 94, p. 17).

assignments were completed, she became bored at work. (Tr. 2153).

D. Union Grievances and Unfair Labor Practice Charges

Complainant's Fair Labor Relations Act (FLRA) complaint arose after the June 17, 1993 meeting with Mr. Mills in which he "accused" Complainant of showing favoritism to OHM after Complainant related that EPA would need to expend another $500,000 on the Southeastern contract and that there would be no audit on the additional funds. (Tr. 2124-25; EPA 2, p. 1). Complainant also sent a copy of this e-mail to Al Yeast, the union president. (Tr. 2126; EPA 2, p.1). Mr. Mills was surprised that Complainant copied Mr. Yeast because Mr. Mills did not see the contract issue as a union matter. (Tr. 1661-62). Complainant filed her first FLRA grievance on September 16, 1993, citing incidences of retaliation for engaging in union activity including: false statements made by management concerning her work on contract matters; unreasonable work requirements in placing her in impossible situations where any response is wrong; and a failure to issue clear performance standards making her work unsatisfactory.[17] (EPA 25, p. 1-2). Also forming the basis of her union grievance were memos form Deborah Davidson, who took over the Southeastern contract, citing deficiencies in Complainant's contract documentation. (EPA 25, p. 3-4). Complainant also alleged verbal abuse and denigration by Ms. Nancy Bach, an acting section chief, among others. (EPA 25, p. 3-6). Complainant contended that the allegations against her by management were unwarranted and unfounded and the she was a good contracting officer as documented by years of good work reviews. (EPA 25, p. 7-8). As a remedy, Complainant sought a transfer from her current department, acknowledgment by EPA management of its harassment of her, and no further retribution for her union participation. (EPA 25, p. 1).

On September 17, 1993, Mr. Mills filed a response to Complainant's grievance stating that no unreasonable work assignments existed that would place Complainant in a position where management would view any action as wrong. (EPA 26, p. 1). Mr. Mills defended his actions in several specific instances and cited to specific occasions where he had reason to question the thoroughness and preparation of Complainant, who in his opinion, was too quick to reach conclusions without viewing the big picture, and too quick to act unilaterally without consulting EPA headquarters. (EPA 26, p. 1-10). Mr. Mills also provided data to show that Complainant was not singled out to do any more work than other contracting staff, and in fact her work load was substantially less. (EPA 26, p. 10-12). On September 30, 1993, Mr. Mills further responded that his actions regarding the Southeastern contract were reasonable and necessary from a management perspective. (EPA 27, p. 1-7). In December 1993, Complainant initiated an unfair labor practice charge alleging an escalated pattern of harassment. (EPA 33, p. 1-3; EPA 36, p. 1).

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[17] Complainant testified that after filing the FLRA complaint she never had a friendly discussion with Mr. Mills and she noticed that Mr. Mills's attitude toward her had completely changed. (Tr.2138). Mr. Mill testified that Complainant was the only employee to ever file a grievance against him.

On January 4, 1994, Donald J. Guinyard, Assistant Regional Administrator of Policy and Management, responded to Complainant's request that she be reassigned to another department and that management acknowledge harassment. (EPA 30, p. 1). Mr. Guinyard determined that her allegations of false accusations by management and claims of harassment were without any sufficient basis and denied Complainant's request for reassignment. (EPA 30, p. 1-2). A response by the union alleged that Mr. Guinyard's determinations were unbelievable and did not accurately reflect the facts or documentation. (EPA 34, p. 1-2). On March 8, 1994, Patrick Tobin, Deputy Regional Administrator, responded to Complainant's grievance stating that he found no factual support for her claims. (EPA 35, p. 1).

Complainant attempted to file another FLRA complaint in 1994 alleging false accusations, unreasonable work requirements, and failure to issue instructions. (EPA 31, p. 1-8). In an April 14, 1994 statement to the Federal Labor Relations Authority (FLRA), Complainant related that in September 1993, she had requested a desk audit to obtain a promotion from a GS-12 level to a GS-13 level of pay, but the personnel office denied Complainant a pay increase based on her manager's remarks about her need for excessive supervision and the representation that management had to take away Complainant's contracting officer's duties. (EPA 32, p. 6). Complainant also noted that minor disagreements over her work never rose to the level of accusations until Complainant joined the union, and Complainant alleged closed door meetings with management, where they threatened to make her life miserable if she filed a grievance with the union about having to work after hours. (EPA 32, p. 3).

On April 29, 1994, Brenda Robinson, Regional Director for FLRA, decided not to issue a complaint on behalf of Complainant. (EPA 36, p. 1). Ms. Robinson concluded that Complainant's dispute with management was more likely the result of a personality clash and that Mr. Mills would have taken the same actions regardless of whether or not Complainant had ever filed a union grievance. *Id*. at 4. Specifically, Ms. Robinson found:

> Erickson has been working very independently on the Southeastern contract, working on a reformation. The reformation was going to require the expenditure of funds; around this time, the administrators of the Superfund Program began inquiring as to why the money was needed. Erickson had been working so independently on the Southeastern contract that none of the managers actually knew what was going on with it. Mills and Singly began holding additional meetings with Erickson, so that she might bring them up to speed. There were several disagreements, with both sides contending that the other took these work-related disagreements personally. The managers were essentially contending that Erickson had not documented the file sufficiently so that someone not familiar with the file could and (sic) understand what Ms. Erickson had done. Erickson contended that it was obvious what had been done, and that they were simply harassing her.

(CX 11 C (10), p. 2).

In a November 2, 1994 memorandum from union president Al Yeast, to Mike Peyton, Mr. Yeast related that Complainant did not have any authority to speak on behalf of the union and he related that Complainant had been informed to avoid accusations of retaliation without supporting documentation, to refrain form working past 6:00 p.m., and to request a transfer to the Human Resources Department. (EPA 37, p. 1). Indeed, in a letter to Complainant the same day, Mr. Yeast stated that after two grievances and one unfair labor practice charge filed on her behalf, the supervisors who previously caused her problems, Jane Singly, Nancy Bach, and Sam Jamison, had all moved, and while she performed her detail, she was no longer under the supervision of Keith Mills. (EPA 38, p. 1).

E. North Cavalcade Contract

While on detail in the Grants Section, Complainant reviewed other contracts in Region 4 to ascertain if they had similar impossibility of performance specifications similar to that of the Southeastern contract. (Tr. 2164). In February 1995, Complainant had received permission to work flexiplace on Monday, February 13, 1995,[18] and to take the rest of the week off. (CX 11C(4)(a-c), p. 1; OIG 1, p. 4-5). While at home, Complainant had her work messages forwarded. While working flexiplace, she received a telephone call from OHM, pursuant to her request that she be notified by OHM if it found any other contract provisions similar to the Southeastern contract. (Tr. 2165-66, 2531-32). OHM informed her that it had received a bid invitation for the North Cavalcade Superfund site in Texas, EPA Region 6, which contained performance specifications nearly identical to those that created an impossibility of performance issue at the Southeastern site. (Tr. 2155-56). This fact was confirmed by Dr. Glasser. (Tr. 1849-50, 1858-59).

OHM asked Complainant to "raise a flag" with the State of Texas Natural Resource Conservation Commission that the required cleanup specifications could not be obtained using a bioremediation process.[19] (OIG 1, p. 7). Before contacting EPA Region 6 on her own, Complainant called a supervisor outside her chain of command, Jan Rogers, but was unable to get through to him. (Tr. 2171). Complainant also contacted Dr. Glasser but he was not immediately available. (Tr. 2170). Knowing that it was imperative to contact Region 6 about the impossibility of performance issue before the bidding on the contract was opened later that week, Complainant decided to contact EPA Region 6 and explain the situation to them. (Tr. 2170-71). Complainant made the telephone call to save the taxpayers millions of dollars and stop potential liability on behalf of the EPA. (Tr. 2174).

On February 14, 1995, Complainant spoke with Gary McGill at the North Cavalcade

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[18] Complainant testified that she intertwined personal time with flexiplace time. (Tr. 2438-39).

[19] For the North Cavalcade site, EPA was responsible for ten percent of the total cost and the State of Texas was responsible for the remaining ninety percent. (Tr. 2528).

Superfund site, supervisor to Lel Medford, Project Manager and Louis Ponce, Assistant Project Manager, and advised him of the performance specification issue. (OIG 1, p. 5, 80). Complainant explained that when she contacted Region 6 she knew that she did not have any contracting duties at EPA, but Complainant stated that she did not contact them as a contract officer. (Tr. 2436). Complainant then had OHM fax a letter on EPA letterhead detailing the performance specification issue. (OIG 1, p. 5, 80). Also, on February 14, 1995, Complainant called Larry Wright, and on February 15, 1995, Messrs. McGill, Medford and Ponce held a conference call with Complainant in which Complainant informed the parties of the performance issue and encouraged a delay in the bidding.[20] (OIG 1, p. 80).

Also on February 14, 1995, OHM Corporation wrote to L.L. Medford regarding the performance specifications in its bid invitation. (EPA 48, p. 1). In that letter, Douglas Jerger, OHM's Technical Director for Bioremediation, and Christopher Swanberg, OHM's Texas District Manager, related that the specified cleanup criteria created an impossibility of performance due to the fact that there was no evidence that the soil cleanup criteria could be met with the proposed technology. (EPA 48, p. 1-2).

On February 16, 1995, Complainant called Mr. Medford voicing concerns about contractor selection, and referring to OHM as a "good contractor." (Tr. 2527). By referring to OHM as a "good contractor" Complainant did not think that she showed the appearance of partiality because the overall context of Complainant's conversation with the North Cavalcade officials, detailing how unsophisticated Superfund contractors would not recognize the technical limitations to performing the contract as written, should have made her impartiality clear. (Tr. 2527). Complainant testified that she intended the statement to mean that "good contractors" like OHM were not going to bid because they know what they are doing and would not touch a contract that contained impossible performance specifications. (Tr. 2533). OHM never submitted a bid for the project. (OIG 1, p. 7).

As soon as Complainant got back to the office, she met with Jan Rogers and informed him of her actions and told him to expect a telephone call from Region 6. (Tr. 2173). Complainant and Mr. Rogers then contacted EPA headquarters. (Tr. 2173). Complainant related that her actions in contacting the North Cavalcade officials were consistent with FAR (Federal Acquisition Regulations)

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[20] Complainant was not alone is discovering problems with the contract specifications. A Regional Applied Research Effort Proposal form Jan Rogers, Chief of S.C. Remedial Section stated:

> There is also potential Agency liability for costs expended in attempting to meet cleanup goals if it can be shown that achievement of the goal cannot be demonstrated due to limitations of the analytical methodologies. An understanding of the reasons for these variations might cause the Agency to rethink the methods used to convey the requirements for demonstrating cleanup effectiveness.

(CX 1, p. 4).

because the FAR directs contracting officers to share information with regards to contracts to protect the government's interest. (Tr. 2177). According to the EPA Guidance on Ethics and Conflicts of Interest, Complainant acknowledged that employees were to avoid any action that might result in, or create the appearance of, giving preferential treatment to any organization or person. (Tr. 2522-54). As a result of Complainant's interference contract bidding was delayed for two weeks and the contract was modified so that the contractor would be totally liable for meeting the specifications. *Id*. Dr. Glasser opined that Complainant's actions at the North Cavalcade site were heroic and that she had a duty to the EPA to make sure her knowledge was imputed into the North Cavalcade contract proposal. (Tr. 1854-55). Ultimately, the North Cavalcade Superfund contract cost the State of Texas 2.5 million dollars before the contractor quit working. (Tr. 2263).

Meanwhile, Mr. Springer saw the document entitled "Contract Requirements vs. Performance Criteria or Standards" that Complainant had OHM fax Region 6 officials on EPA letterhead. (OIG 1, p. 5). Mr. Springer contacted Mr. Jamison who told Mr. Springer about Complainant's involvement in the Region 6 contract. (OIG 1, p. 5). Concerned about possible ethical violations, and inquiries from Region 6 about Complainant's contacts, Complainant's supervisors approached Mr. Waldrop who referred the matter to the Office of Regional Counsel for possible ethical violations. (Tr. 81, 232; OIG 1, p. 14).

F. OIG Investigation and Administrative Action

Upon Mr. Waldrop's referral to the Office of Regional Counsel, Phyllis Harris assigned Leslie Bell to conduct fact finding mission and make a report of her findings. (Tr. 74-77, 1206). Ms. Harris testified that this was not the first time that EPA attorney's had conducted "investigations" of EPA employees because as a general business practice the Office of Regional Counsel conducts a brief "show cause" investigation to determine if allegations warrant a referral to the OIG, which is a serious step, and an initial investigation is sometimes desirable because the OIG has limited resources.[21] (Tr. 1205, 1269).

[21] Such an initial investigation usually benefitted the employee because the Office of Regional Counsel was ascertaining whether the allegation had any merit before making the referral. (Tr. 1277). The Office of Regional Counsel got its authority to conduct such investigations because it had a duty to provide legal advice the deputy regional administrator about ethic issues. (Tr. 82). While the Agency retained jurisdiction over administrative and personnel issues, the OIG had jurisdiction over criminal matters. (Tr. 82). Former OIG special Agent Tyndall stated that the Office of Regional Counsel's investigation of Complainant was not proper because the OIG generally investigates allegations of unethical or other conduct that is prejudicial to the government. (CX 51, p. 2). Agent Mullis also related that the OIG and FBI have exclusive jurisdiction to investigate EPA employees and he did not know why Leslie Bell, from the Office of Regional Counsel , investigated Complainant. (Tr. 369). In his experience he had never seen a document such as Ms. Bell's "investigation" and he interpreted the document as a list of allegations. (Tr. 378-79, 749). In retrospect, Ms. Harris stated that she probably should

As an EPA attorney/employee, Ms. Bell had never received any training concerning protected activity under environmental whistleblowing laws and in conducting her inquiry she was only concerned with ethical violations. (Tr. 205-07). In her investigation, Ms. Bell stated that she reviewed Complainant's files, and thinking that she had all the objective information she needed in the case file, she did not interview Complainant or review Complainant's official personnel file (Tr. 130, 1328-29). Ms. Bell denied having any conversations with Mr. Waldrop or any other supervisor about what management wanted to do concerning Complainant. (Tr. 1331-32). Although she spoke with Keith Mills and Ed Springer, Ms. Bell did not have the sense that any manager lied to her about Complainant, and her main focus was on the documentary evidence. (Tr. 123-24, 163, 165, 1335).

On March 10, 1995, Ms. Bell wrote to Ms. Harris detailing Complainant's actions regarding the North Cavalcade Superfund site, Bechtel, and Southeastern. (CX 6, p. 1-4). Specific conduct giving rise to the appearance of unethical conduct included: failure to perform a profit analysis to justify additional expenditures in the Southeastern contract; communicating with Bechtel's counsel about an indemnification issue without involving the Office of Regional Counsel and asserting a position on the matter without involving headquarters; working past duty hours; entering files and adding comments without the knowledge of her supervisors; submitting her name on a panel paper written by a contractor without informing her supervisors;[22] contacting Regions 6 on a contracting issue without authority;[23] and exhibiting a habit of interfering in other people's business. (CX 11C(2), p. 1-4). Ms. Bell testified that her information was not based solely on fact, but also on the allegations of Complainant's supervisors. (Tr. 242). Due to the passage of time, Ms. Bell had difficulty recalling which parts of her memorandum to Ms. Harris were based on the allegations of Complainant's supervisors and which parts were based on documentary evidence. (Tr. 243-44)

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have gone directly to the OIG and not have used her office as a resource to determine whether or not to make the referral to the OIG. (Tr. 1276).

[22] Complainant related that she checked with Jan Rogers in the office of Superfund Emergency Response, who advised that she did not require approval to review the article and the article contains a disclaimer stating that the EPA did not review or approve the article. (CX 11 C (15), p. 1).

[23] Regarding the Region 6 contract, Ms. Bell found it troubling that she contacted officials in the State of Texas when she was not assigned to the matter. (Tr. 1348). Ms. Bell opined that Complainant may have problems with insubordination, and she improperly interfered the North Cavalcade contract at the direct request of OHM, without following the accepted method or communicating between Regions. (Tr. 1349, 1352). Normally, information is given to a supervisor with direction that another Region is looking for input, that information goes back to headquarters and is then filtered back to the Region. (Tr. 1353-54). Regarding Complainant's paper entitled "Contract Requirements v. Performance Specifications,"that OHM sent Region 6, Ms. Bell related that she did not think Complainant had any authority to put that document on EPA letterhead. (Tr. 1442).

After relaying this information, Ms. Harris told her to wrap up the report and refer the matter to the OIG due to possible criminal implications. (Tr. 85). A copy of Ms. Bell's investigative memorandum was never turned over to Complainant for review before sending it to the OIG for further action.[24] (Tr. 132). Ms. Harris and the contracting staff then met with Mr. Waldrop about possible problems with Complainant's activities. (Tr. 1769-70). Mr. Waldrop did not know if the Office of Regional Counsel spoke with Complainant or not, and doing an independent investigation by himself never occurred to him because both regional counsel and Complainant's supervisors, Ms. Maxwell and Mr. Jamison, came to him about Complainant exceeding her authority and the contracts staff related that both Region 6 and Region 9 had contacted Region 4 questioning the propriety of Complainant's contacts. (Tr. 1769-70, 1875, 1890). Furthermore, the contract program had just undergone a major review and overhaul by the Inspector General's audit and everything that was happening in contracts was very sensitive. (Tr. 1890). Other matters concerning Mr. Waldrop included the recent revamping of the contracts section, congressional hearings on EPA contracts, and the OIG's involvement in those congressional hearings. (Tr. 1911). Given the current political environment, and the fact that Complainant's supervisors came to him accompanied by the Office of Regional Counsel , Mr. Waldrop did not think he had any choice but to call the IG for a meeting. (Tr. 1910).

On March 10, 1995, Mr. Waldrop summoned Complainant to a meeting with Phyllis Harris, Debbie Maxwell, Sam Jamieson, Ed Springer, and Lawanna Woodward, to face accusations of undue influence. (Tr. 2178-79). Complainant wanted to respond to the accusations, but was told that the IG was going to investigate the matter.[25] (Tr. 2180). Mr. Waldrop issued a memorandum to Complainant temporarily suspending her warrant and detailing her to the Information Management Branch effective March 13, 1995. (CX 3, p. 1; EPA 51, p. 1). Specifically, Mr. Waldrop instructed that Complainant was to have no further involvement with contracts; no discussions about contracts with other EPA personnel; no contact with contractors relating to contract administration, contract management, or technical direction; and no access to the contract file room. (CX 3, p. 1; CX 11C(3)(d), p. 1-2). Deborah Maxwell wrote Jeannette Brown, Acting Director Office of Acquisition Management, requesting that Complainant's contracting warrant be suspended, and that warrant was

[24] Ms. Bell testified that someone form the Office of Regional Counsel faxed her report to Special Agent Wilk. (Tr. 1414). Ms. Bell did not want Agent Wilk to have her discussion on possible criminal and ethical violations so she contacted Agent Wilk who redacted the portions of the document at Ms. Bell's instruction. (Tr. 1406; CX 11 C(2); CX 59-61). Accordingly, Ms. Bell testified that she made no recommendations on what course of action to take with regards to Complainant and her only job was to brief Ms. Harris. (Tr. 1402).

[25] Mr. Waldrop related that any knowledge of Complainant's activities and accolades in contracting would not matter because the sole issue presented to him was the allegation of improper contacts with Region 6. (Tr. 1878-79).

never restored.[26] (Tr. 2181-82; EPA 49, p. 1;
EPA 50, p. 1). Beginning on March 13, 1995, Complainant was detailed to the Information Management Branch until further notice.[27] (EPA 51, p. 1).

Regarding the instructions not to speak about contracts, Complainant testified that she was under the impression that she was not to speak to anyone. (Tr. 2179). Complainant turned to Ms. Harris about the legality of the order, and Ms. Harris responded: "I suggest you do what they said." (Tr. 2180). Ms. Harris testified that Mr. Waldrop was merely giving Complainant instructions about her work responsibilities,[28] but she did not consult with Mr. Waldrop about the instruction.. (Tr. 1252, 1254). Mr. Waldrop testified that the context of the instruction not to speak about contracting was not a universal "gag order," but was in relation to her contracting warrant and the suspension of that warrant as it related to her authority under the warrant. (Tr. 1923). Specifically, after listening to input form Ms. Maxwell and Mr. Jamison, he did not want Complainant to have contacts regarding contracts after her warrant had expired. (Tr. 1882-84).

Concerned about the scope of the "gag order," Complainant sent an e-mail to Mr. Waldrop on March 15, 1995, stating that she thought it was "totally wrong and illegal that [she was] not allowed to say anything to anyone." (CX 42, p. 1). Complainant was concerned about her First Amendment rights and her ability to defend herself form management's charges. (CX 42, p. 1). Mr. Waldrop did not respond to Complainant's e-mail. (Tr. 1921-23). In hindsight Mr. Waldrop testified that he would have responded to Complainant's e-mail to explain that she was not under any type of "gag order." (Tr. 1924).

Also, on March 10, 1995, Mr. Waldrop called a meeting with OIG agents Ailverdes Cornelious and Kenneth Wilk, which was attended by Phyllis Harris, Deborah Maxwell, Sam Jamison

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[26] This was the only occasion that Mr. Waldrop had ever suspended a contract officer's warrant. (Tr. 1884).

[27] Mr. Mills had held conversations with Mr. Waldrop concerning Complainant but he was not consulted when Complainant's contracting warrant was taken away or when Mr. Waldrop referred Complainant to the OIG. (Tr. 1533, 1577-78). Mr. Mills was unaware of anyone at EPA who had ever accused Complainant about doing anything illegal or unethical and he did not think Complainant had engaged in any wrongdoing. (Tr. 1535-36). Mr. Mills never expressed a preference whether Complainant should ever be assigned elsewhere. (Tr. 1578).

[28] Ms. Harris had no recollection that she ever issued a gag order to Complainant and acknowledged that such a gag order would be illegal. (Tr. 1198, 1249). Agent Mullis related that he was unaware of any gag order issued to Complainant and he was told by Debbie Maxwell that no gag order existed. (Tr. 413).

and Ed Springer, concerning allegations that Complainant had violated criminal statutes.[29] (OIG 1, p. 14). Mr. Waldrop had asked the IG to interview that group after Ms. Maxwell, and an EPA attorney outlined a report they received from the OIG's office that was prepared by Ms. Bell. (Tr. 1732). At that meeting, Complainant's supervisors related that Complainant was involved in cost overruns in a contract with OHM and that her first line supervisor, Mr. Mills, had to remove her from the contract. (OIG 1, p. 14). The group also detailed Complainant's interference in the Region 6 North Cavalcade contract after she was instructed not to work on any contracting issue, and related that Complainant had a long history of disciplinary problems. (OIG 1, p. 14).

Complainant related that she had never been disciplined in her entire government career. (Tr. 2111). Mr. Mills related that Complainant had no history of disciplinary problems and he was unaware of how anyone could have made such an assertion. (Tr. 1581, 1896-99). Mr. Waldrop denied stating that Complainant ever had a history of disciplinary problems.[30] (Tr. 1733). Mr. Waldrop further testified that the remark was inappropriate because it was not a correct statement, and he acknowledged that the statement would influence how the OIG would look into the investigation.[31] (Tr. 1900, 1917). Furthermore, Mr. Waldrop stated that as the former Chief of Human Resources, he knew that EPA Region 4 only had five or six employees who fit the category of having a "long history of disciplinary problems" and Complainant was not one of those employees. (Tr. 1918).

After the meeting with Mr. Waldrop on March 10, 1995, Complainant called the OIG and demanded that they open her case because she wanted the matter resolved as soon as possible. (Tr. 2180-81). An OIG agent related to Complainant that the OIG supposedly had sixty days to complete an investigation of an employee.[32] (Tr. 2180-81). Meanwhile, Complainant related that Ms. Maxwell, Mr. Jamison, and Mr. Mills thoroughly searched through her desk and files in her contracting office and "confiscated" numerous boxes of her property including several personal items.

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[29] Ms. Harris testified that she could not recall any other occasion where a group of managers convened a meeting with the OIG seeking to criminally prosecute a federal employee. (Tr. 1238).

[30] Mr. Waldrop stated that an employee could have had a reprimand in the employee's personnel file, which would only stay in the file for two years. (Tr. 1956).

[31] Complainant was unaware of the comment made to the OIG investigator that she had a long history of disciplinary problems until she received a copy of the report under FOIA in 1998. (Tr. 2111-12).

[32] The OIG manual provides that after the receipt of a complaint, prompt handling of an employee investigation is required. (OIG Manual Ch. 201, pt. 1-5). Mr. Dashiell stated that it was a policy of the OIG to complete employee investigations as quickly as possible because "it is not a good thing to have this type of cloud over someone's head for any extended period of time." (Tr. 809). Being under investigation was stressful for the subject person. (Tr. 810).

(Tr. 2231-33). The
contracts staff then sent two boxes of material to the OIG agent[33] which was only a small portion of the total amount of material the contracts staff "confiscated." (Tr. 2234).

On March 20, 1995, OIG Agent Mullis opened the OIG investigation of Complainant after his supervisor, Al Cornelius, presented him with a paper prepared by Leslie Bell that contained a possible conflict of interest. (Tr. 362-64). An investigation of Complainant was proper because the OIG's mission was to supervise and conduct investigations relating to Agency programs, and to prevent and detect fraud and abuse in agency programs and operations primarily related to crimes involving EPA employees, contractors or grantees. (Tr. 700; OIG Manual Ch. 201, pt. 1-1). Based on the appearance of impropriety, Agent Mullis felt that Region 4 acted properly in sending the case to his office for investigation.[34] (Tr. 746-47). Specifically, Agent Mullis was investigating possible violations of 18 U.S.C. § 205 (Activities of officers and employees in claims against and other matters affecting the government), 18 U.S.C. § 208 (Acts affecting a personal financial interest), and un-enumerated ethics violations as they related to a conflict of interest affecting the outcome of a contract with a resultant monetary award or special favor. (Tr. 744-45). (CX 12 C(1), p. 1; OIG 11, p. 1). The OIG investigation of Complainant revealed the following allegations:

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[33] Mr. Tyndall, related that OIG should have given Complainant a receipt for her confiscated property, may not have preserved the chain of custody regarding confiscated items, and did not properly investigate Complainant's concerns about theft or removal of items from her office. (CX 51, p. 1-2).

[34] Upon receiving a complaint, a case is only opened for investigation if there is an alleged violation of federal law or agency regulation. (OIG Manual Ch. 202, pt. 2-3). Criminal allegations should be discussed as soon as possible with a U.S. attorney. *Id*. Once a case is open the agent then must formulate an investigative plan. *Id*. at 4-3. Thereafter, the OIG manual directs the agent to conduct a quarterly review of all investigative matters under a year and to conduct a monthly review of all cases over a year old. *Id*. at 4-9. When a case is referred to EPA officials for administrative action, the investigator must follow up to ensure timely action is taken and within thirty days EPA officials should advise the investigator in writing of the administrative action. If EPA officials do not give a timely response, then the investigator should send a follow up memo and maintain the investigative file in a suspended condition. *Id*. at 4-10.

At the conclusion of an investigation, a final report is drafted for approval by OIG Headquarters. (OIG Manual Ch. 202, pt. 4-11). If administrative action was completed after the submission of the final report, a follow-up memorandum must be sent to OIG Headquarters reporting the final disposition and requesting that the case be closed. *Id*. Even though the investigation is completed, a case is not considered closed until there is an administrative disposition. (OIG Manual Ch. 206, pt. 4-3). Final reports of investigations are sent to OIG Headquarters in Washington D.C. no later than twenty days after the last date of investigation. *Id*. at 2-3.

1. Complainant contacted Region 6 officials on behalf of OHM regarding a Region 6 contract that was opened for bidding in February and March 1995.

2. Complainant requested that OHM fax a document entitled "Contract Requirements vs. Performance Criteria or Standards," which was on EPA letterhead, along with a letter to EPA Region 6 regarding the contract proposal when OHM was a potential bidder on the project.

3. Management had removed Complainant from an earlier contract involving OHM at the Southeastern Wood Preserving Superfund Site when she refused to prepare an profit analysis to justify a half million dollar increase due to a contract modification. Complainant's name was also on a panel paper that OHM authored.

4. Complainant contacted Region 6 personnel regarding a contract matter after Region 4's management relieved her of all contracting duties and after her contractor's warrant was suspended.

5. Complainant voiced concerns about contractor selection for the Region 6 North Cavalcade Superfund Site to a Region 6 project manager.

(OIG 1, p. 3-8).

Regarding management's incorrect statement early in the case that Complainant had a "long history of disciplinary problems," Agent Mullis related that it had no impact on his investigation because he was only interested in criminal activity. (Tr. 738-39). Complainant contacted Agent Mullis, on March 21, 1995, explaining to him that she had documentary evidence to resolve the matter. (OIG 14, p. 1). Complainant also called the OIG's hotline[35] to file a complaint based on the fact that management had confiscated her property, but Shirley Lofton in the Washington D.C. Hotline Office advised Agent Mullis that the OIG would take no action on the complaint and that she advised Complainant to take the matter up with her personnel office and not the OIG. (Tr. 2239; CX 12 I, p. 1). On April 4, 1995, Complainant informed John Hankinson, Mike Peyton, and William Waldrop that certain property was taken from her on the same day she was informed of the OIG investigation. (OIG 15, p. 2). Mr. Waldrop testified that he received Complainant's e-mail and he referred the complaint to regional counsel and human resources to make sure nothing was done improperly, and he instructed that if management took any personal items then they should return

[35] Although the OIG's office maintains a hotline for fielding complainants of EPA personnel, including whistleblowers, Ms. Bell related that when an employee wishes to complain about retaliation by the OIG then the OIG would still investigate that complaint, but could, at its discretion, refer the matter to a neutral decision maker in another agency. (Tr. 138-39). The OIG has jurisdiction to investigate criminal conduct of EPA employees, but it assigns a priority to cases that come in over its hotline and someone makes a determination of which issues to look into further. (Tr. 157-58).

them immediately.[36] (Tr. 1964-65, 2239).

On June 1, 1995, Complainant contacted Special Agent Mullins because more records were removed form her office. (CX 12 O, p. 1). Agent Mullins acknowledged that he took the boxes in the presence of union representatives and stated that he failed to see any personal items among the contents. (CX 12 O, p. 1). Agent Mullis further related that he would return the boxes to the regional office when he was finished and that he had no reason to keep them, however, he did not send the boxes back to Ed Springer until May 29, 1996.[37] (CX 12, p. 1; CX 12 R(1), p. 5).

Also in June 1995, contracts management allowed Complainant to retrieve some of her property, but she was only allowed three hours, a time period that Complainant thought was too short. (Tr. 2234). Because Complainant cited physical limitations to moving, another employee brought fourteen boxes of material[38] from contracts to Complainant's cubicle in the Information

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[36] Complainant alleged that she intended to use some of the "confiscated" documents as part of her defense and she asserted that the document confiscation done for the purpose of:

> [B]anning me from access to my area and my documents and for intimidating my potential witnesses to make sure that I would not be able to defend myself against the false, trumped-up charges.

(OIG 15, p. 4).

Complainant never saw any correspondence form Mr. Waldrop to the Human Resources Department asking if anything improper had been done in relation to Complainant's property in her office. (Tr. 2407).

[37] Agent Mullis also reviewed documents form Complainant's office that were provided to him by regional supervisors and managers. (Tr. 373-74). In the ordinary course of business, when the IG needs documents it sends an agent to obtain them and issues a receipt for any personal items. (Tr. 374). Regarding Complainant's documents, it would have been better practice for Agent Mullis to personally pick up the documents from Complainant's office. (Tr. 721). Agent Mullis was aware that Complainant had alleged that documents were stolen form her work area, but he was not concerned with that allegation because the Federal Protective Service had jurisdiction over theft of employee property. (Tr. 712-13). When he interviewed Complainant's supervisors, they provided him with documents, and Agent Mullis thought that it was proper for him to take those documents because they appeared to originate with the government and the managers appeared to have lawful access to them. (Tr. 722).

[38] The large number of personal documents in Complainant's office is due to the fact that Complainant considered an extra copy of a document a contractor sent in, or copies of EPA documents that she made, to be her personal copy. (Tr. 2404-05).

Management Branch, but Complainant noticed that her files form the Air Force were missing. (Tr. 2235, 2244). Two more boxes were later discovered in the contract file room and returned to Complainant, but she related that she was still missing some property. (Tr. 2334-35). On June 7, 1995, Complainant sent an e-mail to John Hankinson and Mike Peyton relating that she had received some of her confiscated/stolen property that was removed form her cubicle. (EPA 58, p. 1). Complainant also alleged that the only reason she had recovered anything was due to union intervention.[39] (EPA 58, p. 1).

On March 27, 1995, Agent Mullis conducted his investigatory interview with Complainant, in the presence of Lynn Townsend, a second OIG investigator. (Tr. 705; OIG 1, p. 201-04). Agent Mullis stated that Complainant was cooperative in responding to his questions, she was not in custody, and that the interview was conducted in a cordial manner.[40] (Tr. 705).

After interviewing numerous other employees, the OIG referred the matter to Assistant United States Attorney, Bill Gaffney, Northern District of Georgia, on June 22, 1995, who declined prosecution, in favor of "appropriate administrative action" because no evidence existed showing that Complainant took anything of value form OHM, and OHM did not obtain the bid nor submit a bid proposal. (Tr. 232; OIG 1, p. 10). Agent Mullis related that by June 22, 1995, he had largely finished his work and he related that he found no evidence of impropriety, criminal activity, or deceit. (Tr. 364, 367, 703). Rather, Agent Mullis opined that management wanted to put some controls in effect on Complainant's activities. (Tr. 425). Agent Mullis opined that Complainant was excitable, argumentative, a borderline eccentric, and she did not act just because she was instructed to do so. (Tr. 425-26). The fact that Complainant was outspoken about environmental contracting matters seemed to cause Complainant's managers discomfort. (Tr. 428).

On August 3, 1995, Complainant called Agent Lynn Townsend to inquire if the OIG personnel "were still trying to dig stuff up." (OIG 26, p. 1). Agent Townsend replied that she thought the matter was still being reviewed. (OIG 26, p. 1). On August 15, 1995, the OIG completed its investigation and submitted it to Divisional Headquarters for approval and distribution. (OIG 9, p. 2). On August 30, 1995, Emmett Dashiell wrote a memorandum to John Hankinson concerning the investigation of Complainant and attached a copy of the investigative report and advised Mr.

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[39] Complainant related that when she had confronted Sam Jamison, he claimed to know nothing despite the fact that he was only one of a select few that had access to her cubicle. (EPA 58, p. 1). Complainant also alleged such lying and cover-up was common by EPA managers and the staff had developed code word abbreviations to describe convenient lying, forgetting and ignorance of unpopular matters. *Id*. Complainant then vowed not to let retaliation against her go unaddressed until she was given the promotion she was wrongfully denied, and a decent job comparable to her contracting officer work. *Id*.

[40] Mr. Tyndall related that, according to the investigation, Complainant was never advised of her criminal constitutional rights in the OIG interview and Agent Mullis failed to have Complainant sign and swear to her statement. (CX 51, p. 2-3). Mr. Tyndall could not ascertain whether OIG ever reviewed Complainant's Official Personnel File. (CX 51, p. 2).

Hankinson to consult with regional counsel before imposing any administrative penalty.[41] (OIG 2, p. 1-2).

EPA Region 4 did not undertake administrative action within the thirty days[42] requested by the OIG. (OIG 2, p. 1; OIG 3, p. 1). On October 25, 1995, Maria Ramos, Regional Counsel for the EPA, had control over Complainant's case and she advised the OIG that Region 4 would make a decision soon. (OIG 11, p. 1). On January 18, 1996, Michel Peyton wrote to the OIG explaining that Region 4 was continuing to review the investigative report for appropriate administrative action. (CX 12 V, p. 1).

On March 28, 1996, William Waldrop[43] sent a memorandum to Ailverdes Cornelious informing the OIG that Region 4,'s management had completed its review of the investigation and although no basis for administrative/disciplinary action exited, Region 4's management decided to permanently reassign Complainant to the Information Management Branch.[44] (OIG 3, p. 1). Mr. Waldrop testified that he decided on permanent reassignment because the Information Management Branch had a Chief that welcomed her assignment, a position was open, and no "clouds" hung over her head. (Tr. 1764-65). He felt that the reassignment was in everyone's best interest because he knew that Complainant had disputes with her former supervisors in the Grants and Procurement Sections and such reassignments were common to end disputes between employees and their managers. (Tr. 1765-66). Specifically, Mr. Waldrop opined that the manager-employee relationship had broken down to a point where attempts at conciliation and mediation would not resolve the situation. (Tr. 1771).

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[41] Mr. Dashiell testified that The OIG investigation was only concerned with criminal matters and the OIG's office had no idea whether an employee's actions would violate an administrative rule, policy, or regulation of the administration. (Tr. 844-45).

[42] Despite the fact that the OIG manual provides that the Region should take administrative action within thirty days, the OIG has no control over the Region and after it refers the investigatory report and the OIG can only inquire as to the status of the Region's action. (Tr. 709-10). Agent Mullis called Region 4 twice to obtain a status report, but he was told that the matter was still pending. (Tr. 692).

[43] Mr. Waldrop undertook these actions in the place of Mr. Peyton because Mr. Peyton was absent form work due to major surgery. (Tr. 2008). Mr. Peyton had read the investigatory report and that Complainant's contract warrant was suspended but he was not involved in these events. (Tr. 1994-95).

[44] Mr. Dashiell had no idea what Mr. Waldrop meant by permanently reassigning Complainant to the Information Management Branch in light of the investigation which cleared her of any criminal wrongdoing. (Tr. 848).

Mr. Waldrop never met with Complainant during the time of her reassignment to tell her that the OIG investigation was completed and that no criminal or administrative wrongdoing existed. (Tr. 1773). Mr. Waldrop never sent Complainant a copy of the memo that made her assignment to the Information Management Branch permanent.[45] (Tr. 1774). Complainant was working in the branch a long time and Mr. Waldrop assumed the Complainant's supervisor, Jack Sweeny, would inform Complainant. (Tr. 1774). Nevertheless, Complainant testified that she knew her transfer out of the contracts branch was permanent with the letter that Mr. Waldrop sent, but she related that she did not contest the administrative action because she did not have access to the underlying investigative report. (Tr. 2985). After Agent Mullis learned that Region 4 had taken administrative action, he closed the investigative file on March 28, 1996, and the file was officially closed on May 15, 1996 with instructions that investigators were to return any material belonging to third parties. (Tr. 692; CX 12 X, p. 1; OIG 4, p. 1; OIG 5, p. 1; OIG 12, p. 1).

Meanwhile, Complainant had initiated another unfair labor practices charge against Region 4 due to her removal form the Procurement Section, the OIG investigation and her assignment to the Information Management Branch and cited numerous actions undertaken by Mr. Mills. (EPA 121, p. 1). Interestingly, Complainant alleged that Mr. Waldrop had assigned her to the Information Management Branch even though the OIG had cleared her of any criminal wrongdoing and that EPA had refused to provide her a copy of the investigative report. (EPA 121, p. 5). On March 29, 1996, Brenda Robinson, Regional Director of FLRA, responded to Complainant renewed assertions and decided not to issue a complaint on her behalf. (EPA 121, p. 1). Ms. Robinson concluded that this unfair labor practices charge was a mere continuation of her earlier filed grievance and she found no new evidence of illegal motivation to provide a nexus between her protected activity (filing grievances and an unfair labor practice charge) and the actions undertaken by management. (EPA 121, p. 6). Specifically, Ms. Robinson concluded that Complainant's reassignment to the Information Management Branch pending the results of the OIG investigation was a plausible move by management and no evidence existed that management would not have taken that move in the absence of any protected activity. (EPA 121, p. 7).

G. Complainant's OIG FOIA Requests and Congressional Inquiries

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[45] Mr. Dashiell related that he expected the action official on an administrative referral to timely inform the employee of the results of the investigation. (Tr. 841). The OIG had no policy or rule that it should inform the investigated party that he or she had been cleared. (Tr. 399, 765, 2913-14). Rather, the accepted practice was that the official recommending administrative action should inform the employee that the investigation was closed. (Tr. 399). Agent Mullis was not aware that Complainant had repeatedly requested in writing that she be advised when the investigation was closed. (Tr. 401). In Complainant's case, she should have been informed in August 1995, after the U.S. attorney had declined prosecution. (Tr. 399). Mr. Peyton related that Mr. Waldrop, as the acting regional administrator, was the proper the person to tell Complainant about the results of the OIG investigation. (Tr. 1198).

On March 23, 1995, Complainant wrote Congressman Newt Gingrich[46] and Senator Paul Coverdell to request assistance in putting an end to EPA's "harassment." (OIG 22, p. 1; OIG 23, p. 1). Complainant supplemented her report of Senator Coverdell, on March 29, 1995, complaining that EPA had deprived her of access to documents, issued a gag order to her and told other employees not to speak with her about any work related matter. (OIG 24, p. 1).

On April 15, 1995, Senator Coverdell wrote a letter to Mr. Martin at the OIG's office sending him a copy of Complainant's correspondence, asking for a review of the materials, and asking that a clarification of the OIG's findings be sent to his office.[47] (CX 12 H, p. 1). On April 21, 1995, Congressman John Dingell, ranking member of the Committee on Commerce, responded to Complainant's letter detailing alleged retaliation, stating that he would forward her request to Joe Barton of Texas who chaired the Subcommittee on Oversight and Investigations.[48] (CX 34, p. 1; CX 35, p. 1). While the OIG investigation was pending, Complainant also sent the OIG a continuing request under the Freedom Of Information Act (FOIA) on April 26, 1995. (OIG 17, p. 1). This request was totally denied[49] by the OIG on May 18, 1995, pursuant to 5 U.S.C. §§ 552(b)(5 & 7), and a similar Privacy Act exemption under 5 U.S.C. §§ 552a(j)(2). (OIG 18, p. 1). The OIG related, however, that at the closure of its investigative file, it would send Complainant a copy of all

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[46] While conducting the investigation, Agent Mullis received an undated memo relating that an aid form Congressman Gingrich's office called asking why the Agency was taking disciplinary action against Complainant when she was trying to protect the agency. (CX 12 K, p. 1). Agent Mullis testified that he was aware that there were Congressional inquiries into Complainant's OIG investigation. (Tr. 370).

[47] With regard to congressional inquires into Complainant's case, Mr. Dashiell responded that the overall responsibility for responding rested with the Inspector General. (Tr. 856). Normally, when the OIG receives a Congressional inquiry that request is sent to an office for public affairs which involves the regional field office and the agent or manager conducting the investigation. (Tr. 857, 864). General practice in the OIG is that congressional correspondence is not ignored and is responded to with high priority and any lapse in responding was "unusual." (Tr. 861, 866, 937).

[48] Complainant also wrote to former Vice President Al Gore, who responded on May 8, 1995, assuring her that he and the President would continue to support federal employee protection. (CX 20, p. 1).

[49] In employee misconduct cases, Mr. Fugger related that an employee can have access to an investigative report in responding to proposed disciplinary action, otherwise the employee can gain access through a FOIA request. (Tr. 2928).

documents that it could disclose by law.[50] (OIG 18 p. 1).

On April 27, 1995, John Hankinson responded to an inquiry from Senator Nunn relating that the investigation of Complainant was ongoing, and that he would forward the Senator's inquiry to the OIG. (CX 12 L, p. 1). On April 28, 1995, John Martin responded to Senator Coverdell's inquiry on behalf of Complainant, confirming the existence of an investigation, refusing to comment on an open case, and responding that he was forwarding the request to the proper division within the OIG. (CX 12 M, p. 1; CX 12 N, p. 1). On May 1, 1995, Michael Fitzsimmons, Assistant Inspector General for Investigations forwarded inquiries form Senator Coverdell to Allen Fallin, Divisional Inspector General for Investigations. (CX 12 N, p. 1). On August 3, 1995, John H. Hankinson, Jr., Regional Administrator, responded to an inquiry form Congressman Newt Gingrich on behalf of Complainant explaining that the investigation was ongoing and that he was referring the request to the OIG's office. (EPA 57, p. 1).

Complainant also spoke with Mr. Peyton during the pendency of the OIG investigation asking whether he had seen the investigative report and inquiring when she could obtain a copy of it. (Tr. 2053). Mr. Peyton replied that she needed to take that matter up with the OIG because he did not know when they would finish their investigation. (Tr. 2053-54). Although Mr. Peyton requested that the OIG office keep him informed, he never received any statement from the lead investigator. (Tr. 2067-68).

Attempting to gain access to her investigative report, Complainant contacted Gary Fugger, a desk officer in Washington D.C. (Tr. 2878). As a desk officer, Mr. Fugger provided staff and administrative assistance to the Assistant Inspector General for Investigations, reviewed field work, prepared memos for the assistant inspector general's signature, and responded to congressional inquiries. (Tr. 2879). Mr. Fugger related that he had four or five telephone conversations with Complainant all of which were prior to August 30, 1995. (Tr. 2882-84, 2926-27, 2973). Mr. Fugger told Complainant that once the OIG reviewed the report and the Assistant Inspector General signed it, the OIG would provide the investigative report to Agency management. (Tr. 2886). Complainant learned about the existence of the report during a phone conversation with Agent Mullis who related that he had sent a report to Region 4 Headquarters but Agent Mullis refused to tell her what the report indicated and Complainant did not know what EPA Region 4 was planning to do with the OIG report. (Tr. 2306-08, 2321).

In response to her Congressional complaints, Complainant testified that Mr. Fugger told her that she had better not try to do "anything else" stating that the OIG's office could keep the

[50] Mr. Dashiell acknowledged that this letter promised Complainant a copy of her investigative file. (Tr. 824). Although his initials appeared on the letter, Mr. Dashiell related that his initials were written by an authorized agent. (Tr. 824). All FOIA requests and responses were routed through the office of John Jones in the OIG office of management. (Tr. 825-26).

investigation open indefinitely.[51] (Tr. 2188-89). Mr. Fugger also related to Complainant that she had better not take any more actions because her contact with Congressmen had not benefitted her. (Tr. 2189-91). Mr. Fugger denied making such statements and denied being aware of any Congressional inquiries. (Tr. 2888, 2898). Complainant testified that she was afraid to inquire further about her case beyond her FOIA request because of Agent Fugger's threat and the prospect that someone would stir up another OIG case against her. (Tr. 2329). With her FOIA requests pending at EPA, knowing that the OIG could not keep an investigation open indefinitely, and realizing that no Congressmen were effectively assisting her, Complainant decided to wait. (Tr. 2192).

When her requests to the OIG to receive a copy of her investigative report did not prove fruitful, Complainant sent a FOIA request to Mr. Hankinson on September 14, 1995, seeking the OIG investigative report. (OIG 21, p. 1). One day later, OIG headquarters approved the investigative report and sent it to the EPA Regional Administrator in Atlanta. (OIG 10, p. 2). On October 3, 1995, the FOIA Coordinator for the Office of Regional Counsel, responded to Complainant's FOIA request by stating that the records she had requested were the property of the OIG and related to Complainant that she was transferring her FOIA request to that office. (CX 12 U(1), p. 1). On October 4, 1995, Joyce Jay, FOIA coordinator for the OIG's Southern Audit Division wrote a letter to Complainant stating that the records she had requested were the property of the OIG's Washington D.C.'s Office of Investigations and that she was forwarding Complainant's request to the proper office. (CX 12 U(2), p. 1). On October 18, 1995, OIG responded to Complainant's September 14, 1995 FOIA request, declining to turn over any information, and promising for a second time that after closure of her case the OIG's office would review the file and send her any documents that it could release under the law. (OIG 19, p. 1). On January 25, 1996, Senator Sam Nunn admonished the OIG that he had not received a response to his inquiry concerning Complainant. (CX 5, p. 1).

In filing a Fair Labor Relations Authority Charge, as reflected in a March 26, 1996, memorandum, Complainant related to the FLRA investigator that the IG had cleared her of any criminal wrongdoing in August 1995 and that the EPA refused to give her a copy of that report.[52] (Tr. 2302; EPA 121, p. 5). Complainant explained this remark by stating that she did not know if the OIG investigation was complete at that time. (Tr. 2203). Rather, Complainant knew that she had provided documentation to the investigator that would clear her of any wrongdoing, and she knew that Region 4 should close her case, but Region 4 refused to give her a copy of the report so she was unsure of what Region 4 was trying to claim. (Tr. 2204-05, 2313). Knowing that Region 4 had a copy of the IG report in August 1995, Complainant thought that by March 1996, when the Region

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[51] Complainant related that she called Mr. Fugger during discovery in August 2001 and after identifying herself, Mr. Fugger immediately attacked her - some seven years after she had spoke with him on the telephone. (Tr. 2195). Mr. Fugger related to Complainant that he did not work on her case and only answered one telephone call. (Tr. 2196).

[52] In a supporting affidavit, dated February 27, 1996, Complainant stated "While the IG cleared me of charges in August 1995, and the EPA has failed to take administrative action for lack of grounds . . ." (Tr. 2312; EPA 122, p. 1-2).

failed to take any action, a reasonable assumption would be that she was cleared of any wrongdoing. (Tr. 2236-37). Complainant had hoped by filing a charge with FLRA she could facilitate the closing of her OIG case. (Tr. 2331-32).

Complainant's OIG case was officially closed on May 15, 1996, after receiving Mr. Waldrop's March 28, 1996 memorandum imposing "appropriate administrative action."[53] (Tr. 692; OIG 3, p. 1; OIG 4, p. 1). Despite her continuing FOIA request and the OIG promise to respond once the case was closed, Complainant waited a long time before the OIG's promise and her FOIA request was honored. Mr. Gekosky, related that when he began to manage the FOIA program in 1997, the FOIA office was chaotic, demoralized, and the office had one FOIA specialist but her regular duties were personnel security and processing. (Tr. 915-17, 920). Eventually, Mr. Gekosky was able to obtain a experienced FOIA personnel who re-discovered Complainant's FOIA request and the OIG's promise to provide her with information on October 2, 1998. (Tr. 921; OIG 20, p. 1). Mr. Gekosky sent a letter to Complainant apologizing for the "administrative oversight" and he complied with part of Complainant's FOIA request, but directed her to Region 4 for the remainder of the materials. (Tr. 922-23; OIG 20, p. 1-2). The discovery of the OIG promise to provide Complainant with the report caught him by surprise[54] and Mr. Gekosky related that no one had ever told him not to provide

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[53] Mr Fugger was not aware of any case that had been open as long as Complainant's where there were pending FOIA requests and four congressional inquiries. (Tr. 2928-29). Mr. Peyton was once investigated by the OIG and within a month he was informed that the OIG investigation had cleared him of any wrongdoing. (Tr. 2010).

[54] After discussing Complainant's FOIA request and the OIG's promise, Mr. Gekosky changed the office's policy. (Tr. 926). Specifically, because their FOIA office did not have a tickler system for following up on FOIA requests, the office now initially denies production when there was an open investigation and instructs the FOIA requestor follow up with periodic requests if there was still an interest. (Tr. 926). Regarding the office's 1995 promise to send the FOIA'd information Mr. Gekosky stated:

> I felt like by saying that they were going to provide her a file, there should have been some sort of system or process in place. There should have been some notifications to staff that subsequently worked on the function and I felt bad because them (sic) things did not happen, to my knowledge.
> . . . .
> I think that, as an upheaval is occurring in an bureaucracy, as a very dramatically different management and approach and style is being put into an office, things can fall through the cracks.

(Tr. 925, 944-45).

Mr. Gekosky related that he was unaware of any Congressional inquires, which would have been forwarded to the office handling the investigation. (Tr. 936).

Complainant with the FOIA file. (Tr. 924).

On February 1, 2000, EPA Region 4 responded to Complainant's FOIA request dated April 26, 1995, regarding records relating to the OIG investigation. (CX 12 Z(2), p. 1). Region 4 determined that the material in its possession were attorney work product and refused disclosure pursuant to 5 U.S.C. § 552(b)(5). (CX 12 Z(2), p. 1). Specifically, the record contained a memorandum of March 10, 1995, from Leslie Bell, Assistant Regional Counsel, to Phyllis Harris, Acting Regional Counsel alleging violations by Complainant. (CX 12 Z(2), p. 1). Complainant testified that she did not know that no basis for administrative action existed until Region 4 complied with this FOIA request. (Tr. 2188).

H. Information Management Branch

Following the meeting of March 10, 1995, Mr. Waldrop assigned Complainant to the supervision of Jack Sweeny in the Information Management Branch. (OIG 3, p. 1). Complainant related that Mr. Mills and Mr. Jamison had called Complainant's former project officers and informed other employees that Complainant had committed a criminal act and no one should to speak to her. (Tr. 2204-05). Employees only spoke to Complainant out of the sight of their managers to avoid guilt by association.[55] (Tr. 2208). On February 2, 1997, Complainant reported that Mr. Waldrop remarked in a joint counsel meeting that he had better leave when he saw Complainant because she was "trouble." (CX 24, p. 1).

Complainant related that upon her reassignment to the Information Management Branch she was put on display in the library. (Tr. 2203). The physical space was not bad, but Complainant stated that her reassignment sent a message to all other employees that she was a leper and nobody was to speak with her.[56] (Tr. 2203). Contrary to Complainant's assertions, the current manager of the branch testified that everyone in the Information Management Branch had worked in library at one time. (Tr. 964). The facility was crowded and only two or three private offices existed for employees with everyone else stationed in cubicles. (Tr. 964). Rebecca Kemp, who managed FOIA personnel, testified that her office was in the library. (Tr. 2623, 2626). Although Ms. Kemp was on detail at the time Complainant was stationed in the library, she stated that all new branch employees were first stationed in the library due to a lack of space, and from time to time other employees had work stations in the library. (Tr. 2623-24). Ms. Kemp was not aware that the library work location

[55] Over time, Complainant related that her work atmosphere improved from when she was assigned to the library with other employees knowing that she was under a criminal investigation. (Tr. 2487).

[56] Mr. Place testified that Complainant was assigned to a six foot square cubicle with four foot high walls in junk space in a basement hallway. (Tr. 266).

was undesirable.[57] (Tr. 2626). Complainant stayed in the library about eighteen months before the Information Management Branch moved locations and she moved into a private office.[58] (Tr. 2212, 2215-16).

Complainant called the 1995 detail that she was assigned to in the Information Management Branch "make work." (Tr. 2216). Complainant obtained her current job as the Information Resources Coordinator after her predecessor suffered a stroke. (Tr. 2216-17). The job description provided that the employee was responsible for the initiation and management of the information resources management contract, managing the interagency agreement (IAG), and conducting analysis and troubleshooting with regards to the delivery of contractor computer services. (Tr. 2220; EPA 102, p. 2). More specifically, Complainant prepared procurement requests, funding packages, monitored the technical performance of contractors, and approved/prioritized work assignments. (Tr. 970-71). The job required technical computer expertise because Complainant was responsible for solving computer problems.[59] (Tr. 978; 2220-21). Complainant was not happy with her job

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[57] Mr. Place first met Complainant shortly after her assignment to the Information Management Branch and found her in a small cubicle in the basement in a space he did not think was suitable for a point-of-contact personnel. (Tr. 265).

[58] In 1996, the Information Management Branch moved out of the "basement," and into the Sam Nunn Atlanta Federal Center. (Tr. 965). Mr. Barrow has five or six GS-12 employees working for him and everyone in the branch is in a cubicle work space, including GS-13 employees. (Tr. 965-66). The only persons in private offices were Mr. Barrow, branch manager, Rebecca Kemp, a section chief, Junelle Williams, who handles sensitive information, an information security officer, and Complainant. (Tr. 966). Complainant's job does not require that she have an office, but Mr. Barrow provided her with one to accommodate her carpal tunnel. (Tr. 966-67).

[59] Mr. Barrow related that the technical computer skills required by her job entailed a general knowledge of computer programs so that she could direct the contractor's process and the job did not require detailed technical knowledge. (Tr. 979, 2935, 2957-58). Complainant had several work assignment managers that worked under her who had the technical knowledge to perform the actual tasks. (Tr. 979). Complainant's job description was actually prepared by Jack Sweeny, and Mr. Barrow did not expect Complainant to become a programmer but only expected a familiarity with the approximately one-hundred basic software packages used by the agency and only expected proficiency in Wordperfect and Lotus Notes, the two applications she used on a regular basis. (Tr. 2953-55, 2958-61). Mr. Barrow thought the level of responsibility was appropriate for a GS-12 employee, and he thought Complainant was capable of performing the job. (Tr. 977, 2935; EPA 102).

Complainant testified, however, that while she was a bright person, she could not become technically proficient in computer technology due to her carpal tunnel syndrome and her inability to make affective use of a keyboard. (Tr. 2576-77). Complainant only uses word processing and

assignment and opined that she was given the position so that she could serve as a scapegoat because she did not know anything about computers and EPA had a long history of asking the contractors to do illegal acts which would reflect poorly on Complainant as their manager. (Tr. 2222).

In 1996, Ron Barrow replaced Jack Sweeny as the head of the Information Management Branch. At the time he began his duties, Complainant was already serving as the Information Resources Coordinator. (Tr. 505). Mr. Barrow knew that her assignment was pursuant to a type of grievance in the Grants and Procurement Sections of the EPA, but he did not know the details of her reassignment or that the OIG investigated Complainant. (Tr. 505, 508). Mr. Barrow testified that he never knew that Complainant was a whistleblower until Complainant told him in August 1998. (Tr. 1016).

Regarding the contract management aspect of her job, Complainant performed well. (Tr. 978, 983, 2224). Particularly frustrating, however, was management of the IAG contracts because management directed her to sign invoices that she could not properly match with the GSA accounts, regional management accounts, and the Grants administrative offices. (Tr. 2228; EPA 102, p. 2). When she complained to Jack Sweeny, he called her "Chicken Little," because she was always complaining and he told her to just sign the invoices and remain quiet, a practice continued by Mr. Barrow. (Tr. 2228-29).

Specifically, management of the IAG contracts[60] was frustrating because GSA paid EPA contract employees and Complainant had to reimburse GSA form EPA accounts.[61] (Tr. 2444-45). To do that, Complainant had technical managers that worked below her that approved the amount of hours a contractor worked. (Tr. 2991). In practice, however, Complainant has no way of knowing if the hours the contractor billed GSA for are correct, and work assignment managers were unwilling to verify the hours a contractor worked because they have no obligation to perform that task. (Tr. 2994). Accordingly, Complainant takes the invoice given to her by the contractors and

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Lotus Notes at work and is not at all familiar with the nearly one hundred other software programs at the EPA. (Tr. 2995).

[60] The Inter Agency Agreement files themselves contained commitment notices, cost tracking information, invoices, work assignment requests, and any type of decision affecting the IAG. (Tr. 2933). IAG files could be audited or reviewed, and even though the same information could be obtained form other sources, Mr. Barrow thought his branch should retain official records. (Tr. 2934). No files were maintained until Complainant took over the job, and the records she did have were duplicates of documents maintained at GSA, the Grants Section, or the EPA offices in Cincinnati. (Tr, 2929-90). Formulating an official records structure for the IAG files was not a fruitful endeavor because Complainant and the records manager were unable to reach an agreement on how they should be maintained. (Tr. 2495).

[61] Mr. Peyton was aware of the problems and related frustration in figuring out the correct billing statements between GSA and IAG. (Tr. 2063).

tells the finance office how much money she needs, prepares commitment notices to send to the Grants Section, which acts on the requests, and the funding is then sent to GSA to pay the contractors. (Tr. 1445). After a time this payment system changed so that when GSA pays a contractor it designates a source account at EPA's Cincinnati office, but due to communication problems, the Cincinnati office often re-designates the account so that the check to the contractor bounces. (Tr. 2992). Rather than ironing out the problems, management instructed Complainant to remain quiet and sign forms approving payment to GSA for the paychecks sent to the contractors. (Tr. 2993, 2997).

As the point-of-contact personnel in charge of overseeing computer contracting services, Mr. Barrow stated that all work assignment managers at EPA are supposed to report to Complainant in regards to the computer work EPA contracted out. (Tr. 515). Complainant related that her job was made more difficult because work assignment managers, who were supposedly under Complainant, continued to go behind her back to have contractors to undertake personnel actions. (Tr. 2223). When a performance problems arose with a contract employee, Complainant forwarded the complaint to GSA, which then informed management who takes care of the problem. (Tr. 2446). The work assignment managers also attempted to circumvent Complainant and go directly to Mr. Barrow who had the same authority as Complainant. (Tr. 515-16, 2936). Mr. Barrow testified that he tried to discourage such behavior but could not stop it, and he attempted to make sure that Complainant had already cleared the proposed action. (Tr. 516, 2225, 2936). Many of the work assignment managers had trouble working with Complainant. (Tr. 515-16).

Mr. Place, an EPA contractor responsible for the placement of contract employees to perform computer operations at Region 4, testified that generally the point-of-contact personnel was an experienced computer programmer or somebody knowledgeable in information systems. (Tr. 260-62). In all his years of contracting, Mr. Place related that Complainant was the only point-of-contact who did not have considerable experience in computing. (Tr. 263). Mr. Place raised his concern with Mr. Barrow, asking him to replace Complainant because her lack of knowledge made the work environment dysfunctional. (Tr. 263). Mr. Place's understanding was that Complainant was the point-of-contact because Mr. Barrow had nothing to do with her assignment and he could do nothing to change it. (Tr. 264).

In dealings with EPA management, Mr. Place related that Mr. Barrow told him that Complainant was difficult person to deal with, and he observed other EPA employees rolling their the eyes, and heading in the other direction when Complainant moved into an area, leaving Mr. Place with the impression that Complainant co-workers shunned her.[62] (Tr. 267, 279). The fact that

[62] One such instance was when an EPA employee came up behind Complainant and made ugly hand gestures and made faces at Complainant when her back was turned. (Tr. 276-77). Based on his management training and experience, Mr. Place thought that Complainant worked in a hostile environment. (Tr. 278). Although he was not able to articulate exactly what a hostile working environment was, Mr. Place stated: "A hostile work environment is kind of like pornography. I can't describe it to you. But I know it when I see it." (Tr. 303).

Complainant co-workers shunned her made it difficult for Mr. Place because Complainant was not aware of what was going on and she did not have the technical knowledge to obtain the required information herself. (Tr. 268). In another attempt to have Complainant replaced, Mr. Place went to GSA to appoint another person, but was informed that because Complainant was a whistleblower that she could not be reassigned. (Tr. 269).

Mr. Place related that he observed behavior from the technical points-of-contact within the EPA that undermined Complainant's job. (Tr. 275). Specifically, other employees would sit on travel information for weeks, wait for Complainant to be out of the office, and then present the problems to Mr. Barrow. (Tr. 275). Mr. Place discharged several employees who were unwilling to work with Complainant and unwilling to work in the environment at the EPA. (Tr. 275-76).

Based on his dealings with Complainant, Mr. Place related that Complainant was argumentative. (Tr. 305). Mr. Place also acknowledged that Complainant was a difficult person with whom to deal because she had a hard time sticking to a specific topic. (Tr. 342-43). Also based on his observations, Mr. Place related that there was no one personality conflict between Complainant and another employee, but the hostility directed toward Complainant was more organized and universal.[63] (Tr. 314, 347). Even Complainant's supervisor Ron Barrow acted in what Mr. Place thought was a sarcastic manner toward Complainant.[64] (Tr. 341).

In Mr. Barrow's opinion, Complainant's technical ignorance was not the source of her job problems, rather Complainant lacked organizational skills, needed improvement in getting to work on time and had difficulty communicating with other employees. (Tr. 983-86). Specifically, Complainant must frequently interact with the Comptroller Branch of the Agency; however, because Complainant is argumentative, the comptroller personnel prefer to deal with Mr. Barrow to resolve

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[63] Mr. Place stated:

> Nobody wants to talk about her at the EPA. Go ask somebody at the EPA about Sharyn Erickson. You won't get much of a response. They just acknowledge that she exists at all. (sic). It's not natural. Somebody - - somebody in the EPA organizational structure is managing that. It's not normal for a group of human beings when you put them in a common work environment for them to gang up against one and shun them. Brutal. . . . Avoiding her, not communicating with her not keeping her informed, I mean, it's absolutely bizarre. I mean, I went in there and pulled an employee off the task. She didn't even know there was a problem.

(Tr. 348-49).

[64] Mr. Barrow testified that he was not hostile towards Complainant and he had not observed any hostility directed toward Complainant outside of an encounter with a union steward. (Tr. 511, 1062).

issues that are a critical part of Complainant's job. (Tr. 991-92). Nevertheless, Mr. Barrow described Complainant as a hard worker. (Tr. 556). Mr. Barrow described Complainant as outspoken and described her e-mails as inflammatory, but related that he had a good working relationship with Complainant, and he never issued her a bad performance appraisal. (Tr. 557, 1023, 2934).

Indeed, Complainant received higher performance appraisals in the Information Management Branch than she did working in the Procurement and Grants Section. In her 1994-95 performance evaluation, Jack Sweeny assigned Complainant 425 points and gave her a rating of "exceeds expectations." (CX 41 B, p. 2-3). Mr. Sweeny specifically related that Complainant had done an excellent job of managing and administering the GSA, IAG and APD service contracts. (CX 41 B, p. 5). For the 1995-96 performance evaluation, Jack Sweeny again assigned Complainant 425 points and a rating of "exceeds expectations. (CX 41C, p. 2-3). For the performance evaluation covering the 1996-97 period, Ron Barrow, rated her performance as "exceeds expectations," with a score of 410 points. (EPA 95, p. 1, 3). Complainant refused to sign her evaluation because she disagreed with management's decision to remove her form her career field. (EPA 95, p. 2). Likewise, for the evaluation period covering 1997-98, Ron Barrow rated Complainant as "exceeding expectations," but Complainant refused to sign the evaluation. (EPA 101, p. 2). EPA performance appraisal forms were revised and Complainant was also given a "successful" appraisal for calendar years 1998-1999 when the only other option on the review sheet was "unsuccessful." (EPA 97, p. 4; EPA 100, p. 1). Mr. Borrow commented that Complainant did an "outstanding" job. (EPA 100, p. 6). In the performance period covering calendar year 2000, Mr. Barrow again summarized Complainant's performance as "successful." (EPA 96, p. 1). Nevertheless, Complainant refused to sign the document due to her on-going issues with EPA personnel actions against her. (EPA 96, p. 1).

H(1) FOIA

Complainant's job as the Information Resources Coordinator did not occupy all of her time and she often asked Mr. Barrow for additional work. Mr. Barrow acknowledged that Complainant was under utilized in her job[65] and she could take on additional duties if there were any appropriate tasks. (Tr. 506-07). Knowing that the FOIA section always needed additional help, Mr. Barrow arranged for Complainant to help respond to FOIA requests under the supervision of Rebecca Kemp.[66] (Tr. 1060, 2627).

Most of the work Ms. Kemp had to offer was data entry, which Complainant was not willing to do because of her carpal tunnel disability. (Tr. 2627). Instead, Complainant was assigned to help

[65] On numerous occasions, Complainant stated to Mr. Barrow that she was being "idled" by the agency. (Tr. 530).

[66] Ms. Kemp manages seventeen employees, who are professionals ranging from geologists, environmental specialists, and FOIA specialists. (Tr. 2621-22).

a FOIA specialist comply with a request dealing with contracts. (Tr. 2627-28). Complainant refused FOIA training that Ms. Kemp offered stating that she was already familiar with FOIA during her tenure at Robins Air Force Base. (Tr. 2628, 2975). Complainant related that the FOIA staff had reservations about her joining that office because she was a higher grade and the FOIA staff was worried that she might cut off their promotion potential. (Tr. 2981). In a short period of time Ms. Kemp requested that Complainant no longer assist in the FOIA office. (Tr. 1061).

Problems arose when an issue came up in the FOIA request Complainant was working on concerning whether EPA could release pricing information. (Tr. 2975). Complainant realized that the FOIA staff was improperly releasing cost information and Complainant suggested that someone should call headquarters and she directed their attention to a legal treatise. (Tr. 2975-76, 2978). Rather than making a decision on their own, the FOIA staff retorted that they were waiting on Lief Palmer, an EPA attorney to make a ruling on what information to release. (Tr. 2977).

Ms. Kemp related that Complainant took it upon herself to call headquarters and her interference caused confusion and further delay, which caused Complainant to miss statutory FOIA deadlines. (Tr. 2629). One of Ms. Kemp's FOIA specialists stated that she would no longer work with Complainant and so Ms. Kemp did not assign Complainant any more FOIA work. (Tr. 2629). On May 22, 2001, Ms. Kemp justified her decision relating that Complainant was unable to follow established procedures, failed to meet deadlines, inappropriately questioned the staff in the Procurement and Grants Sections, and Complainant undertook FOIA requests that created a conflict of interest.[67] (EPA 107, p. 6). Complainant broke the chain of command and did not follow instructions in an office where procedures were very important. (Tr. 2644-45). Complainant was not a team player because she would not listen, cooperate with others and she took actions without discussing it with others first. (Tr. 2652).

In February 2000, Complainant was a recipient of a branch wide memorandum instructing employees that the FOIA office was destroying electronic backup tapes to prevent future search for FOIA purposes. (EPA 107, p. 1). Complainant, concerned that the destruction of backup tapes violated FOIA, took this memo and distributed it to members of Congress. (EPA 107, p.1). On February 18, 2000, Ron Barrow issued a memorandum concerning a Congressional inquiry about the alleged destruction of records. (EPA107, p. 1). Mr. Barrow explained that the EPA policy was in compliance with FOIA regulations and the records that were destroyed were only backup copies of

[67] Ms. Kemp never showed Complainant the memo she wrote for Mr. Barrow on why Ms. Kemp had to remove Complainant form FOIA. (Tr. 2647; EPA 107, p. 6). At the hearing, Ms. Kemp retracted her statement that Complainant created a conflict of interest in the FOIA office as an editorial error. (Tr. 2707, 2984). Ms. Kemp could not recall what FOIA deadlines were missed and what extensions were granted. (Tr. 2702). In writing her letter for the record Ms. Kemp did not do the investigation herself, but only relied on her staff to relate the events. (Tr. 2695, 2698-99). Ms. Kemp also related that Complainant was seen going through the trash. (Tr. 2701).

existing hard-copy documents.[68] (EPA 107, p. 1-2).

Subsequently, at the end of a regularly scheduled branch meeting, Ron Barrow asked if any employee had additional matters to discuss, and a FOIA specialist, Marilyn Brinson, stood up as stated that she wished that the person who initiated the congressional inquiry would come to speak with the FOIA office before going to Congress. (Tr. 1051, 2635, 2766, 2774-75). Complainant stated that everyone else in the meeting was allowed to make a negative comment about the person leaking information to Congress, but nobody identified Complainant by name. (Tr. 3031-32). Rather, Complainant was identified by the process of elimination as everybody in the room was allowed to say something negative. (Tr. 3032). Complainant specifically remembered Rich Shekel, Ron Barrow and Rebecca Kemp, among the dozen meeting attendees, making comments that concerns should be kept internally. (Tr. 3032-33). Ms. Kemp, however, testified that she never witnessed any hostility directed toward Complainant. (Tr. 2635). Ms. Kemp denied that everybody at the meeting made a negative statement about what had happened and that she only remembered Complainant speaking out after Ms. Brinson's comment. (Tr. 2682). Similarly, Mr. Barrow stated that no one at the meeting knew Complainant had made the Congressional inquiry even after the comment made by Ms. Brinson and there were no hostile remarks directed toward Complainant. (Tr. 1051-52, 1060). At the short meeting, neither Mr. Barrow nor Ms. Kemp explained that the employees should back off because activities with Congress were protected. (Tr. 2778, 3039). On February 20, 2000, Complainant filed a whistleblower complaint of post-complaint retaliation and hostile work environment alleging that she was subject to a din of hostile remarks at the branch meeting for leaking information to Congress.

Ms. Kemp did not know that Complainant had initiated the inquiry, but after the meeting, several members of her staff came to her opining that Complainant was to blame. (Tr. 2682-82, 2775). Ms. Kemp testified that even after FOIA staff approached her pointing the finger at Complainant, she did not know who initiated the inquiry, and she did not care because she answered Congressional inquiries on a frequent basis. (Tr. 2634). The inquiry was actually beneficial because she had tried to obtain an answer from Headquarters on the issue for some time. (Tr. 2681). Ms. Kemp still needs assistance in the FOIA department, and is possible that Complainant could continue to work there, but the staff had little confidence in Complainant. (Tr. 2630).

H(2) AFC Peoples With Disabilities Advisory Counsel

As an employee of the EPA, Complainant became the Agency's program manager for people with disabilities, and she was authorized to spend up to twenty-five percent of her time working on that program. (Tr. 1939). Complainant's official term expired on June 1, 1998 and Nancy Barron took her place, but Complainant remained on the EPA advisory counsel. (Tr. 1756, 1939, 3004,

[68] Counsel for the EPA had discovered, through the deposition testimony of David Lewis in unrelated litigation, that Complainant had informed other that EPA employees were being told to destroy e-mails. (CX 18, p. 2-3).

3012). EPA was just one of many employers in the Sam Nunn Atlanta Federal Center and disabled employees working for different employers within the building began an unofficial group in March 1998, entitled "AFC People With Disabilities Advisory Counsel" to address the concerns of handicap personnel regarding such issues as power doors, handicap parking spaces, difficulty using EPA's new security system, camera's in the parking garage and the placement of skid strips. (Tr. 3016; CX 32 A, p. 1; CX 32 D, p. 2, CX 32 E, p. 1). Complainant was listed as a point-of-contact for the Advisory Counsel as was Bill McLesky, who worked for GSA. (CX 32 A, p. 1; CX 32 D, p. 3).

Pursuant to discussions in the Advisory Counsel, Complainant spoke to Mr. White about renovations to EPA space and ADA compliance. (Tr. 2015). Also, in March 1998, when Complainant spoke with Mr. Waldrop about designated handicap spaces in the parking garage, Mr. Waldrop sent Complainant to GSA and told her to speak with Mr. McLesky. (Tr. 3001-02; CX 32 E, p. 1). When Complainant contacted Mr. McLesky, he told her to address her concerns to Mr. White, the official EPA representative to GSA.[69] (Tr. 2731). Complainant tried to explain to Ms. McLesky that she did not have to go through Mr. White because the Advisory Counsel was not an EPA organization. (Tr. 3001). Eventually, Complainant's direct contracts with GSA led that Agency to contact Mr. White to complain about Complainant's conduct. Specifically, Mr. White testified that GSA complained about Complainant's inappropriate contacts in relation to a July 12, 1998[70] incident where Complainant approached Mr. McLesky about ADA requirements for new construction, and a July 8, 1998 incident where Complainant demanded an EPA ADA representative be put on a building committee. (Tr. 2723-30). Additionally, Mr. White related that he witnessed several loud outbursts between Complainant and other employees in his section. (Tr. 2741-42). Once Complainant was arguing with a security officer about locked doors in the elevator lobby, and a second time Complainant was demanding different access during different hours for EPA contractors. (Tr. 2742). Another time Complainant wanted a fire-door unlocked to allow her better access to a nurses station. (Tr. 2743).

Mr. White did not approach Complainant about complaints from GSA regarding her contacts because he was not her supervisor. (Tr. 2732). Rather, Mr. White routinely contacted the supervisor of problem employees to correct an employee for directly contacting GSA. (Tr. 2736). Accordingly, Mr. White approached Mr. Barrow on several occasions over the years but he was without success in changing Complainant's behavior. (Tr. 2732). GSA did not want Complainant contacting it directly because it preferred to work through the designated official from each agency in dealing with building issues considering there were 1,250 employees in the building. (Tr. 2732).

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[69] As the head of the facilities management section, Mr. White was responsible for providing EPA Region 4 with everything form cars to mail. (2718-19). GSA is the landlord to all the federal agencies in the building and GSA leases the building from the city of Atlanta. (Tr. 2720). Any issue regarding the ADA and handicap access to the building comes through Mr. White. (Tr. 2721). Mr. White also chairs any committee that is organized in the building. (Tr. 2719).

[70] July 12, 1998 was a Sunday.

Subsequently, on August 4, 1998, Michael Peyton issued a memorandum to the AFC People With Disabilities Advisory Counsel stating that there was no official recognition or endorsement of that group by the tenant agency in the Sam Nunn Federal Center. (EPA 103, p. 1). Mr. Peyton requested that the name of the group be changed to avoid the impression that it represents the tenant agencies. (EPA 103, p. 1). Topics addressed by the Advisory Counsel should be submitted to the appropriate management officials within the group's respective agency for submission to GSA and individual tenants should not contact GSA directly. (EPA 103, p. 1-2). Also, as there was no official recognition of the group, EPA employees were not authorized to use official time to attend its meetings. (EPA 103, p. 1).

On August 5, 1998, Mr. White and Mr. Waldrop approached Mr. Barrow concerning Complainant's behavior and involvement with the Advisory Counsel, and asked him to sign a written warning[71] admonishing Complainant that she could not continue her activities on official Agency time.[72] (Tr. 535-39). Mr. Waldrop told Mr. Barrow that: the Advisory Counsel was not an established organization; the existence of the Advisory Counsel was causing confusion in the federal center; and that it was inappropriate for Complainant to represent the Advisory Counsel when she was not the EPA's officially designated People with Disabilities Coordinator. (Tr. 1739). The specific allegations against Complainant were provided by Mr. White[73] and included: directly contacting GSA on July 12, 1998, about EPA renovations and refusing to direct those concerns to Mr. White when requested to do so; demanding of GSA on July 8, 1998, that and EPA ADA representative be appointed on a committee; going directly to GSA demanding more handicap spaces; making representations on behalf of the agency on behalf of persons with disabilities when she was not the official representative on official duty time; involving herself with the AFC Peoples With Disabilities Advisory Counsel; and using loud and offensive language toward other employees. (Tr. 1741, 2723; EPA 103, p. 3-4).

Mr. Barrow could not recall Mr. Waldrop ever asking him to sign a memo relating to any other employee. (Tr. 541). Neither Mr. Waldrop nor Mr. White was Mr. Barrow's supervisor and they never explained why they were asking him to sign the memo instead of Mr. Barrow's boss, Mike

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[71] Regarding a the written warning issued to Complainant, Mr. Peyton related that it was an administrative tool to try to get an employee's attention so that the employee would cease and desist or change their behavior is some way. (Tr. 2028-29). If the employee ignored the warning letter, it could be a step to receiving a reprimand. (Tr. 2029).

[72] Mr. Waldrop related that he had gone to other supervisors in the building and asked that they warn an employee of improper activities, but he could not remember if there were any other written warnings. (Tr. 1741, 2257).

[73] Mr. Waldrop drafted part of the written warning and he discussed the contents of the warning with Mr. Barrow and Carlos Ascencio from personnel. (Tr. 1983). Mr. Waldrop denied having knowledge about improper contacts with GSA. (Tr. 1983-84). Mr. Waldrop never spoke with Complainant before issuing the warning. (Tr. 1889).

Peyton. (Tr. 542, 544). Because Mr. Waldrop was senior management, Mr. Barrow was willing to accept his representations. (Tr. 544-45). Additionally, part of Mr. Waldrop's job was to represent the EPA in the federal building regarding building activities.[74] (Tr. 1736). In describing Mr. Waldrop's impression of Complainant, Mr. Barrow stated that Mr. Waldrop had "problems" with Complainant because she is a difficult person. (Tr. 552). Mr. Barrow had never signed a memo like the one Mr. Waldrop had presented to him, and he did not conduct any investigation to see it the allegations in the memo were true. (Tr. 1138-40, 1142).

Interestingly, the written warning was issued to Complainant one day before she was scheduled to meet with an OSHA investigator about her whistleblowing complaint.[75] (Tr. 1735). Complainant was not given a chance to defend her actions or show documentation before she was issued the written warning letter. (Tr. 2260, 3018). Defending her activities at the hearing, Complainant testified that she never approached Mr. White on July 12, 1998, about renovations to EPA space and compliance with the ADA Act. (Tr. 3013-14). Rather, the incident in question concerned a simple inquiry on behalf of the AFC Peoples with Disabilities Advisory Counsel as to who the point of contact would be within GSA. (Tr. 3001). The July 8, 1998 incident demanding EPA ADA representation on a committee was done by other employees. (Tr. 3001). Complainant denied taking any action after June 1, 1998, the date that she was not longer the official chair person for the disabled at the EPA and only attended one meeting after that date. (Tr. 2258, 3004, 3012).

H(3) Flexiplace

An EPA manager is vested with the authority to place an employee on flexiplace and the manager may remove flexiplace privileges at the manager's prerogative. (Tr. 1002). Since 1997, Mr. Barrow had allowed Complainant to regularly work flexiplace hours meaning that she could take two days every pay period (every two weeks) to work her regular hours at home.[76] (Tr. 517; EPA 109-114).

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[74] Mr. Peyton related that it was appropriate for Mr. Waldrop to approach Mr. Barrow about issuing a written warning because Mr. Waldrop served as the point of contact within the EPA concerning the management of the federal facility on behalf of Mr. Peyton. (Tr. 2044-46).

[75] Mr. Waldrop denied having any knowledge about Complainant's meeting with the OSHA investigator on the following day. (Tr. 1735). Had he known about the OSHA meeting, Mr. Waldrop would have waited to issue the warning letter until after the meeting was over. (Tr. 1975). Mr. Barrow, however, had approved Complainant's request for leave so that she could attend the meeting. Mr. Waldrop related that he and the other authors of the written warning knew that Complainant had filed a whistleblower complaint. (Tr. 1751-53, 1975). Mr. White testified that he just wanted her to follow established rules and procedures. (Tr. 2753).

[76] Complainant and another Information Management Branch employee, Charlotte Hutchins, accumulated more flexiplace days than the rest of the branch combined. (Tr. 517).

Due in part to the large number of contracting boxes in her office, and to a large number of IAG files that Complainant had accumulated, her office was extremely cluttered. (EPA 116, p. 1-10). In the early part of the year 2000, the comptroller was auditing GSA about contracting discrepancies, and Mr. Barrow was worried that the Information Management Branch would also be audited concerning GSA's contracting discrepancies and Complainant was the project officer for that contract. (Tr. 520). Mr. Barrow asked Complainant to cleanup her office and organize her contract files so that the branch could withstand an IG audit. (Tr. 520).

On February 28, 2000, following a job performance appraisal, Mr. Barrow indicated that Complainant had not complied with his instruction to cleanup her office. (EPA 113, p. 4). Additionally, a security problem developed with EPA e-mail and the entire local area network was shut down for a period of time. (Tr. 527-28). Believing that Complainant could not work effectively on flexiplace without e-mail, and in light of her refusal to cleanup her office and the disorder of certain IAG files, Mr. Barrow suspended Complainant's flexiplace privileges. (Tr. 527-28; EPA 113, p. 4). On March 6, 2000, Complainant responded that it was not a valid sanction to take away her privileges for actions that are outside her authority and outside her job duties. (EPA 113, p. 3). Specifically, Complainant indicated that because she was not a records control officer, it was not her responsibility to define the record structure for the Agency, and a review process was needed to define the files before they could be structured. (EPA 113, p. 3). Nevertheless, Mr. Borrow indicated on March 10, 2000, that until Complainant cleaned her office and put her files in order she no longer had flexiplace privileges. (EPA 113, p. 2).

Worried about the state of Complainant's office and knowing that Complainant had pending litigation, Mr. Barrow asked his secretary, Ms. Maddox, to enter Complainant's office on March 15, 2000, and take photographs.[77] (Tr. 520; EPA 116, p. 1-10). On May 19, 2000, Complainant filed a whistleblowing complaint alleging hostile work environment based on a denial of flexiplace. On June 23, 2000, Complainant wrote to Mr. Barrow that she had attempted to comply with his verbal instruction regarding her office and her files, but Mr. Borrow's instructions kept changing. (EPA 113, p. 8). The "mess" Mr. Barrow was referring to in Complainant's office were documents related to Complainant's whistleblower litigation. (Tr. 526; EPA 113, p. 8) Mr. Barrow never took anything form her office without Complainant's permission, but he was aware that pursuant to a union contract he had the right to go into Complainant's office and remove official documents and document on EPA letterhead he would assume was an official Agency document. (Tr. 1023, 1025, 1027).

In the process of cleaning up her office, Complainant had conversations with Doug Haire, the records manager, who became frustrated with Complainant because he was unable to reach a consensus with her on how to appropriately organize the IAG records in her office. (Tr. 1122).

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[77] No one asked Mr. Barrow to take the photographs and he shared them with counsel for Respondent EPA. (Tr. 521-22). Mr. Barrow had never directed that photographs be taken of other offices and he acknowledged that other offices in the building were not perfectly organized. (Tr. 522).

Complainant requested a place to file documents related to her litigation where she would have unrestricted access to them. (EPA 113, p. 8). Also, she had been waiting for months to obtain additional filing cabinets. (EPA 113, p. 8). Mr. Barrow responded on June 27, 2000, that Complainant had space to store the files, and she could obtain a new filing cabinet by contacting Rich Shekell. (EPA 113, p. 9). Mr. Barrow also stated that Complainant could store her boxes related to her whistleblower litigation at the Atlanta Federal Center storage facility or with her personal attorney. (EPA 113, p. 9). On August 3, 2000, soon after obtaining filing cabinets, Complainant complied with Mr. Barrow's requests, cleaned her office, and Mr. Barrow reinstated her flexiplace privileges. (Tr. 528, 1130; EPA 113, p. 27).

After learning that Complainant had thirteen boxes of material at home, Mr. Barrow instructed her to bring the boxes back to the office to determine what is an official record and then to properly file it. (Tr. 1031-33; EPA 113, p. 8). On June 28, 2000, Complainant wrote back that she did not have any files or records at home, but only had copies. (EPA 113, p. 12). Nonetheless, Complainant found some official Agency documents and brought those back to work. (Tr. 1034). Once Complainant complied with his request, Mr. Barrow felt that the matter was resolved. (Tr. 1035).

On March 16, 2000, Mr. Barrow granted Complainant administrative leave to participate in the OSHA investigation of her environmental whistleblower case. (EPA 113, p. 5). On June 26, 2000, however, Mr. Barrow indicated that her activity with OSHA could not be done on Agency time. (EPA 113, p. 11). Complainant replied that the OSHA investigation was no different from any other administrative adjudication for which the EPA routinely allowed administrative leave, and requested that Mr. Borrow provide the regulation that denied leave for such activities. (EPA 113, p. 11). Mr. Barrow indicated that there were no provisions under Whistleblower laws that allowed employees official time to meet with investigators, and even if there were, the time Complainant was spending was unreasonable, and he amended her time card to reflect eight hours of annual leave. (EPA 113, p. 13). Complainant did not believe Mr. Barrow, however, and requested specific citations. (EPA 113, p. 15). By July 5, 2000. Mr. Barrow had spoken to Karol Smith at the EPA legal department who indicated that Mr. Barrow could charge Complainant annual leave for participating in the whistleblowing litigation unless she could prove otherwise. (EPA 113, p. 16). Mr. Barrow also gave Complainant until July 21, 2000, to bring in all her boxes from home and he arranged a space at the Atlanta Federal Center to store her documents. (EPA 113, p. 16-18). On July 19, 2000, Complainant filed a whistleblower complaint alleging post-complaint retaliation and "conscious parallelism" between EPA and OSHA. On July 20, 2000, Complainant sent Mr. Barrow an update stating what boxes she had brought in and stated that: "There is no principled reason for EPA to use the threat of insubordination to make what in effect is a discovery request." (EPA 113, p. 21). Complainant further stated: "there is no principled reason for EPA to waste my time - - just so that the papers can be eventually thrown into the trash here, instead of at home. I also don't appreciate all the sleep I am losing due to this all at once, when I don't get enough to begin with." (EPA 113, p. 21). On October 18, 2000, Mr. Barrow again charged Complainant with annual leave when she took time to attend an OSHA investigation meeting. (EPA 113, p. 28).

Conflicts between Complainant and Mr. Barrow regarding flexiplace privileges continued, and on May 15, 2001, Mr. Barrow indicated that he told Complainant that he could not continue to approve flexiplace after Complainant spent two weeks in a row trying to fix problems with her computer. (Tr. 529, EPA 114, p. 2). Additionally, Complainant stated that she did not have enough work to stay busy, and Mr. Barrow informed her that she could not work at home with nothing to do. (EPA 114, p. 2). Complainant replied that he could not deny flexiplace time because the EPA was "idling" her.[78] (EPA 114, p. 2). On May 16, 2001, Complainant met with Mr. Barrow and the union representative Lawana Woodward, during which Complainant's regular flexiplace was discontinued, and it was resolved to find additional tasks for Complainant to perform. (EPA 114, p. 3). The following day, however, Mr. Barrow approved Complainant's regular flexiplace while he investigated the issue of "idling" in the context of past agency actions. (EPA 114, p. 4). On May 23, 2001, Mr. Barrow formally discontinued the use of regular flexiplace privileges. (EPA 114, p. 7). Regarding her denial Complainant stated: "This is the filmiest pretext yet, and just makes my case better and better with every contrived action against me." (EPA 114, p. 7).

I. Denial of Promotion

Complainant testified that she did not quit her job at EPA, despite working in what she considered a hostile work environment, because she did not think she could obtain a comparable job in the private sector. (Tr. 2230). Complainant wanted to apply to another agency, but then she thought that no one would hire her because she was still under a criminal investigation. (Tr. 2230). Additionally, Complainant thought that her current job as the Information Resources Coordinator, which was a position created by Jack Sweeny, was non-essential and subject to downsizing in the event of a reduction in force. (Tr. 2269). Complainant did try to return to her former job in contracting, working under Mr. Mills,[79] by applying for the following positions at EPA Region 4:[80]

Application Date	Job Title	Grade	Selected Candidate
07/17/97	Procurement Specialist	13	No selection

[78] Complainant acknowledged that the agreement stated that management had the right to remove an employee from the program if the employee's participation failed to meet the needs to the organization as defined by the supervisor. (Tr. 2452-53).

[79] At the hearing Complainant testified that she wanted to do contracting work for the EPA, but not be subject to the supervision fo Mr. Mills. (Tr. 2415-18).

[80] Complainant also applied for other positions and details outside of contracting for which she was not selected, but Complainant did not raise those non-selections in her complaint because she did not know if she was more qualified than the other applicants. (Tr. 2431-34).

11/05/97	Program Analyst Procurement Specialist	13 13	No selection
11/05/97	Procurement Specialist	13	Jeffery Napier
05/08/98	Contract Specialist	13	Charles Hays
06/23/00	Detail	01	Fran Harrell and Jeffery Napier
08/01/00	Contract Specialist Contract Specialist	12 12	Anita Wender No selection
08/01/00	Contract Specialist	13	No selection
01/19/01	Contract Specialist	09	No selection
02/02/01	Contract Specialist	13	Fran R. Harrell and Jeffery L. Napier
05/24/01	Detail	01	Sharonita Byars

(EPA 60-66, 76, 84, 88).

A contract specialist performs procurement planning, develops procurement objectives in terms of funding arrangements develops pricing arrangements, subcontracting policy and set-aside policies. (EPA 77, p. 2). The contract specialist serves as a leader of a team leading to the award of contracts or contract administration, and serves as an advisor to program officials. (EPA 77, p. 2). Additionally, a contract specialist serves as a lead negotiator, plans and coordinates negotiation strategy, and makes determinations as required by law or regulation. (EPA 77, p. 2). Basic qualifications to apply for the position include a bachelor's degree in any field and to enter as a GS-13, the applicant must have completed prescribed training or have twenty-four academic hours in areas dealing with business administration. (EPA 77, p. 2). Candidates are ranked according to skill in developing procurement strategy, knowledge of agency rules, ability to evaluate proposals, ability to communicate orally, and the ability to write effectively. (EPA 77, p. 2-3).

For the procurement specialist position that Complainant applied for on July 17, 1997, Complainant was one of five candidates, out of eighty-four applicants, to have a score of "100" but there is no evidence in the record that any person was selected for this position. (EPA 64, p. 1-4). Likewise, Complainant's November 5, 1997 application received the third highest score out of fifteen applicants for the procurement specialist position. (EPA 65, p. 1). Apparently, no selection was made. (EPA 65, p. 1).

Mr. Mills selected Jeffery Napier to fill a procurement specialist position on March 2, 1998. (EPA 63, p. 1). Complainant was one of five candidates ranked as "highly qualified." (EPA 63, p. 1). In not selecting Complainant, Mr. Mills stated that the person he selected had the right "temperament." (Tr. 1683). Following Complainant's non-selection, she filed a whistleblower complaint on April 8, 1998.

On July 27, 1998, Mr. Mills declined to select any candidate on the merit promotion certificate for the contract specialist position for which Complainant applied on May 8, 1998. (EPA 66, p. 1). Among the candidates for this position, five were "highly qualified" and Complainant was one of two "qualified" applicants. (EPA 66, p. 1). In the non-competitive candidate referral certificate, however, Mr. Mills chose Charles Hayes for the position. (EPA 66, p. 2). In total, Mr. Mills testified that he interviewed nine applicants including Complainant. (EPA 67, p. 1). He selected Mr. Hays based on responses given during the interview and his background and experience. (EPA 67, p. 1). Specifically, Mr. Hays exhibited a high degree of confidence, and his application reflected leadership ability in that he was a team leader and a former contracting officer, and a current GS-13 warranted senior contracting officer with unlimited contracting authority. (EPA 67, p. 1). Furthermore. Mr. Hay's background with Navy contracts impressed Mr. Mills, and most importantly, Mr. Hays appeared to have the temperament to work well with Program and Technical staff. (EPA 67, p. 1). Complainant acknowledged that Mr. Hays was likely more qualified for the position than herself. (Tr. 2268).

Regarding the detail complaint applied for on June 23, 2000, the record contains the application of Fran Harrell, Jeffery Napier, and Complainant. (EPA 72-74). Mr. Mills selected both Ms. Harrell and Mr. Napier on September 1, 2000, to fill the detail. (EPA 75, p. 1). Complainant filed another whistleblower complaint in September after she learned of her non-selection. Complainant was one of six candidates referred for consideration. (EPA 75, p. 1). Ms. Harrell was already a senior contracting officer in the Procurement Section, served in leadership positions, and had received numerous accolades such as the Superfund Team of the Year Award and received cash awards based on her performance. (EPA 72, p. 3-4). Prior to becoming a contract officer in 1991, Ms. Harrell was a procurement analyst, a project
officer, and she began her career as a contract specialist in 1984. (EPA 72, p. 3-7). In 1989, Ms. Harrell received her MBA form Georgia College and State University. (EPA 73, p. 2).

Jeffery Napier also received an MBA in 1991, and was a certified professional contracts manager since 1995. (EPA 73, p. 1). Prior to his selection, Mr. Napier had nearly ten years of experience as a GS-13 procurement analyst, and he began his contracting career in 1984 as a contracting officer at Robins Air Force Base. (EPA 73, p. 1-2). Like Ms. Harrell, Mr. Napier was working under Mr. Mills at the time of his selection. (EPA 72, p. 1; EPA 73, p. 4).

Complainant's application reflected that she had over eighteen years of contracting experience, supervising programs and serving as a contract officer. (EPA 74, p. 1). Unlike Ms. Harrell and Mr. Napier, Complainant was a GS-12 at the time of her application. (EPA 74, p. 2). Also unlike Ms. Harrell and Mr. Napier, Complainant had been removed form the contracting field

since 1995. Nevertheless, Complainant had certification as a procurement professional and had received awards and letters of appreciation form the EPA based on her contracting work. (EPA 74, p. 9). While Complainant did not have an MBA, she had an academic background in psychology and criminal justice. (EPA 74, p. 15-19, 23-260). Complainant testified that she had more contracting experience than both Jeffery Napier and Fran Harrell. (Tr. 2268). In selecting other candidates ahead of Complainant for contracting jobs, Mr. Mills related that they had leadership abilities. (Tr. 1693). Mr. Mills also related that in working with Complainant he knew that Complainant had the ability to tackle issues at the headquarters level and she exhibited leadership qualities. (Tr. 1693-95).

On September 9, 2000, Matthew Robbins selected Fran Harrell and Jeffery Napier for a detail position. (EPA 62, p. 1). Complainant was one of six candidates referred for selection. (EPA 62, p. 1). Mr. Robbins became chief of the Grants and Procurement Branch in September 1996, after Complainant had transferred to the Information Management Branch. (EPA 118, p. 1). Mr. Robbins chose Mr. Napier and Ms. Harrell because both possessed current contract officer's warrants which circumvented the need to go to EPA headquarters for purchase approval. (EPA 118, p. 1). Because the detail was only for three to four months, it was practical to chose Mr. Napier and Ms. Harrell because to chose a candidate without a current warrant would increase the paper-work delays. (EPA 118, p. 1). Furthermore, Mr. Robbins was familiar with Ms. Harrell and Mr. Napier, was pleased with their past performances, pleased with their abilities to assume leadership positions, and both had acted as managers in Mr. Mill's absence. (EPA 118, p. 1). Introduction of an outside employee was impractical because Mr. Robbins already had two employees in the branch that met the requirements. (EPA 118, p. 1). Mr. Robbins denied ever having knowledge of Complainant's protected activity. (EPA 118, p. 1-2).

On October 16, 2000, Mr. Mills selected Anita Wender to fill one of two positions as a contract specialist for which Complainant had applied on August 1, 2000. (EPA 76, p. 1). Complainant was one of only three "highly qualified" applicants referred for consideration on the list for one of those positions, and she was one of the remaining "highly qualified" applicants to fill the other position, but, Mr. Mills did not choose any candidate to fill the second spot. (EPA 76, p. 1-2). Ms. Wender served for eighteen years in Human Resources at various agencies including: the Office of Personnel Management, Housing and Urban Development, Department of Labor, and the Navy. (CX 15 C, p. 1). Ms. Wender obtained a B.A. in Sociology and a M.A. in Environmental Studies. (CX 15 C, p. 1). Complainant testified that Ms. Wender, a person with over twenty years of service in personnel, was not as qualified for the position. (Tr. 2265-67). Mr. Mills related that he picked Ms. Wender over Complainant because she had four years of contracting experience at HUD. (Tr. 1715).

Keith Mills selected Fran Harrell and Jeffery Napier on March 5, 2001, for the contract specialist (GS-13) position for which Complainant had applied on February 2, 2001. (EPA 61, p. 1). Complainant was one of five candidates referred for consideration. (EPA 61, p. 1). The duties of the person selected for the detail included serving as the lead senior contract specialist responsible for managing a team of contracting officers and specialists in the procurement of complex projects. (EPA 79, p. 1). Additionally the selected candidate would provide expertise and guidance on

interpreting contract terms, cost and pricing, negotiating and on how to apply regulations. (EPA 79, p. 1).

On March 13, 2001, Mr. Mills did not select any candidate for the GS-9 contract specialist position. (EPA 88, p. 1). Complainant was not listed as either a "highly qualified" or as a "qualified" candidate. (EPA 88, p. 1-2). On July 25, 2001, Mr. Mills selected Sharonita Byars for a detail in the Procurement Section. (EPA 84, p. 1). Complainant was one of six candidates referred for consideration. (EPA 84, p. 1). The detail lasted for 120 days and the purpose was to perform review and analysis on assigned procurement requirements. (EPA 85, p. 1). Specifically, the selected candidate would review performance specifications and statements of work to make recommendations concerning whether they are written to obtain maximum competition. (EPA 85, p. 1). Other duties included: performing cost/price analysis on analyst on all procurement actions less than $500,000, prepare contract documents, and monitoring work progress. (EPA 85, p. 1). After Mr. Mills selected Ms. Byars, Complainant filed a whistleblowing complaint alleging retaliation after winning a remand before the ARB and being denied the job in favor of a secretary.

Ms. Byars application packet reflects that she was a GS-9 executive staff assistant since May 1995. (EPA 86, p. 1). Ms. Byars had received a degree in business management in 1990 from Atlanta Metro College, and her experience included soliciting real estate contracts, vice president of a joint venture, reviewing statements of work at a cable communications company, and she was a quartermaster in the National Guard. (EPA 86). Complainant was not picked for this detail because the detail was for someone to do lower-graded contract work and learn the system. (Tr. 1713-14).

Testifying at trial, Mr. Mills related that he did not chose Complainant for any position because after interviewing Complainant, he did not think that she was the best applicant. (Tr. 1578, 1594). Specifically, there were times during the interview that she did not thoroughly answer his questions, and she often seemed aggravated. (Tr. 1594). Mr. Mills opined that Complainant had a problem with supervision, and that she resented the authority of not only Mr. Mills but also of his supervisors. (Tr. 1599-1600). After so many years of working with Complainant, Mr. Mills did not feel the need to contact Mr. Barrow, but he would ordinarily contact the current supervisor of an applicant. (Tr. 1601). Mr. Mills denied being angry at Complainant for filing a grievance against him and he denied being prejudiced against her.[81] (Tr. 1685). Although he did not state that Complainant was contentious and argumentative in his performance appraisals that pre-dated Complainant's grievance, Mr. Mills related that he had oral conversations about Complainant's inability to effectively communicate with other personnel and he acknowledged that she had a difficult time in establishing a working relationship with other employees. (Tr. 1579, 1688). Mr. Mills often had healthy debates among his employees and the fact that his employee disagreed with him was not a basis for him to take management action. (Tr. 1690). The difference with Complainant was that after a debate, from a management perspective, Mr. Mills needed certain things done, but those things were never

[81] Complainant was the only person to ever file a grievance against him in his career as a manager. (Tr. 1686). Mr. Mills also stated that he was not angry at Complainant for disagreeing with him with respect to the Bechtel issues and the Southeastern contract. (Tr. 1568).

accepted by Complainant. (Tr. 1691). Mr. Mills also related that if Complainant was reinstated as a contracting employee, Mr. Mills would work with her just like any other employee. (Tr. 1570).

J. Media Disclosures Regarding Whistleblowing Activities of Complainant

On June 10, 1998, the Washington Times published a letter from twenty individuals, one of whom was Complainant, that detailed mismanagement by EPA and whistleblowing retaliation. (CX 14, p.1, 23). In response, the Hon. James Sensenbrenner, Jr., Chairman, Committee on Science in the House of Representatives directed the General Accounting Office to investigate on how EPA management had responded to the allegations of retaliation detailed in the Washington Times. (CX 22, p. 1). The General Accounting Office issued that report after interviewing the authors of the letter, including Complainant on January 29, 1999. (CX 14, p. 1).

On March 23, 1999, Complainant contributed to a press information packet sponsored by the National Whistleblower Center. (CX 16). In that packet Complainant detailed her involvement in the impossibility of performance issues in bioremediation performance based Superfund contracts and resultant criminal investigation. *Id*. at 31-32. Complainant was also involved in articles written in the Environmental Insider on June 14, 1998, and the Investors Business Daily, on August 20, 1998, concerning retaliation against her for whistleblowing activity.

K. Medical Records and Testimony

Complainant testified that she was always in good health until she started having problems with Mr. Mills in 1993. (Tr. 2182). Subsequently, Complainant was diagnosed with irritable bowel syndrome, gastritis, anxiety disorder and aggravated asthma, all of which she related to workplace stress. (Tr. 2183). Secondary to her anxiety disorder, Complainant noticed memory deterioration and the inability to maintain a train of thought. (Tr. 2185). The anxiety disorder also affected her speaking skills because she felt that every time she opened her mouth she would be attacked and criticized. (Tr. 2185). Complainant uses her background in psychology to help deal with the stress. (Tr. 2186).

As a result of her working conditions, Complainant also experienced a dramatic increase in her blood pressure. (Tr. 2209-10). Stress caused Complainant difficulty with her jaw because she clenched it under pressure. (Tr. 2212). Complainant acknowledged other areas of stress in her life, such as giving birth and staying on bed rest while pregnant - activities that Complainant described as "good stress." (Tr. 2541-43). Complainant alleged many of the same symptoms during the latter part of the year 2000 in connection with hypothyroidism. (Tr. 2547-48; CX 10, p. 41). Complainant explained, however, that the symptoms were related to stress and not hypothyroidism because her condition did not go away with the use of medication. (Tr. 2550). Complainant also acknowledged

that her previous job in the Procurement Section caused her stress, but when she returned to her former job, she expected to work reasonable hours. (Tr. 2571-72).

On January 20, 2002, Dr. Daniel Patterson, a psychiatrist, performed an evaluation of Complainant. (CX 50 A, p. 1). Complainant related to Dr. Patterson that she was passed over for promotions within the EPA, accused of inappropriate dealings with a contractor, "shunned" at work, and put on display. *Id*. Complainant also alleged that because of her activity she was idled in her current job, but had won an award within the past year for her work in the Information Management Branch of the EPA. *Id*. As a result of ongoing litigation, Complainant reported that she suffered from constant stress, aggravation of her irritable bowel syndrome, and aggravation of her arthritis. *Id*. Additionally, Complainant related that she was constantly anxious, had difficulty sleeping, had frequent headaches and suffered from an inability to relax. *Id*. at 1-2.

In Dr. Patterson's opinion, Complainant had no significant psycho-pathology that would have predated her employment with the EPA in 1989. (CX 50 A, p. 2). Complainant's work was "both her vocation and avocation." *Id*. Dr. Patterson directly related the stress and strain of her treatment at EPA and the resultant legal proceedings to a generalized anxiety disorder and aggravation of her irritable bowel syndrome. *Id*.

III. DISCUSSION

No employer, subject to the provisions of the whistleblowing statutes, "may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the employee . . . engaged in any [protected activity]." 29 C.F.R. § 24.2(a) (2001). A complainant has thirty days from the time of the employment action to file a complaint. 29 C.F.R. § 24.3(b) (2001). To establish a *prima facie* case of discrimination under Whistleblower statutes, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;[82]
2. The complainant engaged in protected activity under the act;
3. The employer took adverse action against the employee;
4. The employer knew or had knowledge that the employee was engaging in protected activity; and

[82] On February 13, 2002, in an Order Granting and Denying in Part Complainant's and Respondents' Motions for Summary Judgment, I ruled that Respondents were subject to the jurisdiction of the Court under the applicable environmental statutes with the exception of the Toxic Substances Control Act on the grounds that Respondents had not waived sovereign immunity. *See Stephenson v. NASA*, 1994-TSC-5 (ALJ June 27, 1994); *Mackey v. United States Marine Corps*, 1999-WPC-6 (ALJ July 13, 1999). I also found that Respondents and Complainant had an employer-employee relationship, thus, Complainant was covered by the Acts.

5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

See American Nuclear Resources, Inc. v. U.S. Department of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998); *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

A. Contention of the Parties

Complainant argues that the record established direct evidence of discriminatory intent as reflected by: the issuance of a "gag order;" destruction of documentary evidence; referring Complainant for an OIG investigation that effectively black-listed her; providing the OIG with false data; refusing to disclose the results of the OIG investigation; and deviating from established investigative procedures. Respondents had direct knowledge of Complainant's protected activity stemming form Complainant raising concerns about Superfund environmental regulations, procedures, policies and practices in 1993 on the Southeastern Superfund site. Direct evidence of retaliation includes: reassignment; requesting premature documentation, making false accusations of assisting a contractor; misstating indemnification and federal facilities issues concerning Bechtel; conducting an illegal investigation by an EPA attorney; fabricating falsehoods (interfered in others business, disciplinary record); never checking Complainant's personnel file; accusing her of large cost overruns; accusing her of misrepresentation; accusing her of co-authoring a paper for a superfund conference without permission; issuing a warning letter the day before an OSHA investigation; and accusing her of not preparing a profit analysis as directed by her supervisor. Complainant contends that her actions both sincere and were heroic.

Complainant further alleges that she was subject to a hostile work environment as reflected by: idling; shunning; undermining her authority; keeping her in the dark on work related issues; putting her on display in the library for eighteen months; issuing a "gag order;" denying pay increases and job promotions; removing her flexiplace; publically searching and confiscating things in Complainant's cubicle without making an inventory then failing to return the items; pressuring her to dispose of discoverable evidence; denying training and permission to attend conferences; name calling, inadequate investigation of grievances; prohibiting access to contract files; denying leave to comply with discovery requests; placing her in a position to be the scapegoat for problems with computer contractor's time and funds; demanding that she turn over potentially discoverable evidence; making hostile remarks and circulating disinformation about her case to colleagues; and by making hostile comments in a FOIA meeting. As a remedy Complainant seeks reinstatement, back-pay, compensatory and punitive damages, and affirmative action.

Respondent EPA first argues that argues that the continuing violation theory does not apply to Complainant's claims falling outside the thirty day filing period. Specifically, Complainant should be barred from asserting claims that occurred more than thirty days before April 8, 1998, the time of Complainant's first whistleblower complaint. Considering events prior to that date is not proper

because Complainant did not prove that her non-selection and incidences occurring in the Information Management Branch were related to events that took place in 1995 regarding the North Cavalcade site and other alleged protected activity. Similarly, Complainant failed to show a pattern of discriminatory conduct. There is no evidence of a discriminatory policy or practice because Complainant failed to establish that Mr. Mills's non-selection, which occurred three years after her alleged protected activity, was related to her protected activity since Mr. Mills had no knowledge of the scope of the OIG investigation and did not initiate the OIG investigation. Mr. Barrow purposefully tried to avoid information concerning the OIG investigation so that Complainant could have a clean slate in his department. Likewise, Complainant's non-selection and Information Management Branch incidences were not related to a series of retaliatory events considering that the alleged acts of retaliation in 1998 are different that the alleged acts of retaliation in 1995, and Complainant's transfer to the Information Management Branch and the suspension of her contracting warrant were permanent decisions. Mr. Mills did not select Complainant for contracting positions because of any alleged protected activity, rather her non-selection was based on prior missed deadlines, her opinionated badgering of other employees, general contentiousness and refusal to accept management decisions.

Neither is equitable tolling available to consider claims occurring prior to her first complaint because Complainant was never misled or prevented by Respondents from asserting her rights, and her unfair labor practices claim, alleging retaliation for union activity, did not raise the precise claim in another statutory forum. Furthermore, Respondent EPA asserts that Complainant failed to show a hostile work environment because: Complainant failed to prove the Office of Regional Counsel and OIG investigations, as well as her non-selection, were in retaliation for protected activity; failed to show that the alleged discriminatory acts were pervasive and regular; failed to show that she suffered any detrimental effects or that a reasonable person would be detrimentally affected because Complainant failed to prove any monetary loss or damages, failed to establish her medical condition is linked to her work environment; and Complainant failed to show that respondent superior liability exists.

Second, Respondent EPA contends that Complainant failed to show any materially adverse action based on her alleged protected activity. Specifically, Respondent EPA argues that the Office of Regional Counsel inquiry and the referral to the OIG concerning Complainant's actions regarding the North Cavalcade site was not materially adverse and that the statement that Complainant had a "long history of disciplinary problems" did not result in any tangible job detriment. Similarly the failure to notify Complainant about the results of the OIG investigation was not an intentional act. Likewise, Respondent EPA asserts that the revocation of Complainant's warrant, the written warning, the suspension of flexiplace and the non-selection were not motivated by a retaliatory animus. There is simply no nexus between Complainant's alleged protected activity and any alleged adverse employment action. Finally, Respondent EPA asserts that Complainant is not a credible witness in light of many inconsistencies in her testimony and in the record.

Respondent OIG contends that this proceeding is nothing more than an attempt by Complainant to obtain job reassignment, a promotion, and a large sum of money on a claim that she

is a whistleblower. Respondent OIG further argues that the OIG investigation of Complainant did not constitute actionable adverse employment action because: the investigation was authorized by the Inspector General Act of 1978; an OIG investigation does not inevitably lead to some other materially adverse consequence since an investigation is simply a fact-finding mission; the OIG did not recommend that the Agency take any adverse action; and Complainant suffered no formal disciplinary action as a result of the investigation. Respondent OIG contends that the fact that it did not affirmatively advise Complainant of the investigative findings was not actionable adverse action because Complainant is not entitled to a notice of the OIG's investigative findings, and there is no evidence showing how the lack of notice resulted in a tangible job consequence. Furthermore, Respondent OIG contends that its delay in processing Complainant's FOIA request is not actionable adverse action because delay does not constitute an action related to the compensation, terms, condition, or privileges of employment. Likewise, Respondent OIG argues that Complainant's claim of hostile work environment lacks foundation because Complainant failed to establish that the hostile working environment, if any, was pervasive and regular. The investigation, the non-disclosure of the investigative report, and the FOIA delay were separate activities by separate components within the OIG and no action was taken in concert with EPA Region 4.

Second, Respondent OIG argues that its actions were not motivated by Complainant's protected activities. Specifically, the OIG investigation was based on legitimate, non-discriminatory, non-frivolous allegations of a possible conflict of interest. Respondent OIG contends that it conducted its investigation without any retaliatory animus, it conducted a thorough investigation in a timely fashion and found insufficient evidence to substantiate allegations against Complainant. No evidence exists to show complicity between the OIG and EPA Region 4 to retaliate against Complainant. The investigation and the resulting report of investigation were the sole work product of the OIG and when the report was turned over the EPA Region 4, that effectively ended the OIG's involvement. Likewise, Respondent OIG asserts that its untimely advisement of the investigatory findings and the U.S. attorney's denial of criminal prosecution was not motivated by retaliatory animus because the OIG is under no legal obligation to inform the subject of an investigation of their findings and the OIG had every expectation that Complainant's management would inform her of her criminal exoneration.[83] In any event, Respondent OIG alleges that Complainant knew about the results of the investigative report through the frequency of her contacts with OIG investigators and as evidenced by a documents related to her FLRA complaint in 1996.

Similarly, Respondent OIG argues that there is no evidence that a delay in providing Complainant the report of investigation under FOIA was motivated by a desire to retaliate against Complainant for protected activity. The original denial under FOIA was proper under 5 U.S.C. § 552(b) (5 & 7(A)). Due to organizational and personnel transitions within OIG FOIA, Complainant's FOIA request merely fell through the cracks until a new FOIA specialist was hired in 1998. Finally, Respondent OIG argues that if Complainant prevails, she has not shown that any alleged retaliation

[83] Respondent OIG asserts that the U.S. attorney's denial of prosecution is by no means an "exoneration." Rather the U.S. Attorney had an expectation that Complainant's management would pursue administrative disciplinary action against Complainant.

caused any psychological damage, aggravated or exacerbated pre-existing medical conditions, or has caused her out of pocket medical expenses. Likewise, there is not foundation for punitive damages as the alleged retaliation was not intentional or egregious.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to evaluate the credibility of the witnesses and to weigh the evidence. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 466 U.S. 844, 855, 102 S. Ct. 2182, 2189, 72 L. Ed. 2d 606 (1982). When the proof of ones case depends on subjective evidence, a credibility determination is a critical factor and the ALJ should explicitly discredit such testimony or the fact that the evidence is incredible must be so clear as to amount to a specific credibility finding. *Tieniber v. Heckler* 720 F.2d 1251, 1255 (11 Cir. 1983); *Bartlik v. Tennessee Valley Authority*, 88 ERA 15 (Sec'y Dec 6, 1991).

B(1) Complainant

Respondent EPA attacked Complainant's credibility citing contradictory statements in the record: 1) Complainant stated that she did not know the OIG cleared her of any wrongdoing until the OIG complied with her FOIA request in 1998, but Complainant had signed an affidavit in February 1996 stating that the OIG had cleared her; 2) Complainant accused EPA of transferring her out of her career field, but offered no credible explanation for saying that she wanted to get out of "the department;" 3) Complainant told OIG investigators that she was authorized to work flexiplace over several days when her time card showed that she was only authorized to work one day on February 13, 1995; 4) Complainant stated that she contacted Region 6 as a concerned taxpayer but offered no explanation as to why she identified herself as a Region 4 contract officer; 5) Complainant alleged that she was "idled" and had no work to do, but testified that she often worked at home on things that she does not get paid for; 6) Complainant complained about not being paid overtime, but asserted her rights to be on EPA premises after hours; 7) Complainant claims to be entitled to "trash" copies of documents contractors send to EPA and alleged that they constituted "personal" property that EPA stole from her; 8) Complainant alleged a hostile work environment, but was given a well-attended baby shower after filing her second whistleblower complaint; 9) Complainant does not keep regular time and attendance; and 10) Complainant alleged that she did not have a private office, calling it the "computer's office" but she asserted her right to store personal documents there.

Contrary to Respondent EPA's assertion, I find that Complainant made a credible witness and that the above inconsistencies are adequately explained in the record. First, Complainant explained the statement in her February 1996 affidavit supporting her unfair labor practices charge by stating she did not know if the OIG investigation had completed but she knew that she had provided adequate documentation to clear her of any wrongdoing; and she inferred that she was cleared without having any hard evidence because Region 4 had a copy of the report since the summer of 1995 and neither the OIG or the EPA had undertaken any criminal or administrative action. (Tr. 2203-05, 2313, 2331-32; EPA 121, p. 5). Second, while Complainant did request a transfer out of the Procurement Section in her September 16, 1993 union grievance, she never requested

reassignment to the Information Management Branch on March 13, 1995, as ordered by Mr. Waldrop. (EPA 25, p. 1; EPA 51, p. 1). Third, while Complainant was only authorized to work one day of flexiplace on February 13, 1995, her statement to OIG investigators that she worked several days of flexiplace is explained by the fact that Complainant intertwined personal time with flexiplace time so that one day's work was spread over several days. (Tr. 2438-39; CX 11 C(4)(a-c); OIG 1, p. 202).

Fourth, Complainant testified that she did not contact Region 6 as a contract officer, rather, in explaining to officials in Region 6 about the contract specifications giving rise to an impossibility of performance, she had to detail the events at the Southeastern Superfund Site where she was a contracting officer. (Tr. 2171-72, 2436; EPA 20, p. 1). Fifth, Complainant explained her statement that she was "idled" in the Information Management Branch, but worked on things she was not paid for by stating that issues would arise on her day off and she would deal with the problem even though she was not scheduled to work. (Tr. 530, 2509-10). Sixth, I find nothing inconsistent with Complainant complaining about not being paid overtime and asserting her right to be on EPA premises after hours.

Seventh, Complainant explained that she often kept a copy of an official agency document for future reference. (Tr. 2238-39). Whether these documents were "personal" as a matter of law has no bearing on Complainant's credibility. I have no doubt that Complainant thought the documents were personal property and her subjective belief explains her comment that Respondents "stole" her property. Eighth, while Complainant alleges a hostile work environment, she explained that things at work gradually improved with time so that by 1998 when she had her baby shower some people were having civil conversations with her and while she is still shunned by some it is not nearly as bad as when she was under the OIG investigation in 1995. (Tr. 2487-88). Ninth, Complainant explained that she does not keep regular time and attendance because Mr. Barrow allows flexibility in her attendance to compensate for work she does at home. (Tr. 2483-84). Finally, Complainant was allowed to use a private office to use a voice activated computer because of her disability. (Tr. 966-67). Pursuant to a union agreement Complainant was to perform all other work in a cubical but Mr. Barrow thought that would be inefficient so he allowed Complainant to stay in the office. (Tr. 968-70). Thus, I find Complainant's statement consistent because officially the office is only for the use of the voice activated computer, but unofficially Complainant uses it as her personal work space. Accordingly, I find that Complainant adequately explained the above inconsistencies and I find that Complainant is a credible witness.

B(2) Gary Fugger

I was not impressed with the testimony of Mr. Fugger at the hearing. In 1995, Mr. Fugger was serving as a desk officer in Washington D.C. where he provided staff and administrative assistance to the assistant inspector general for investigations. (Tr. 2878-79). He reviewed field work, prepared memos for the assistant inspector general's signature and responded to Congressional inquiries. (Tr. 2879). In 1995, Mr. Fugger recalled having several conversations with Complainant

about her OIG investigation. (Tr. 2882). Mr. Fugger denied that he ever told Complainant that she had better not initiate any more Congressional inquiries because they had not done her any good, and denied stating that the OIG could hold open her investigation indefinitely. (Tr. 2888). Considering that Complainant had initiated several Congressional inquiries during the time period that she spoke to Mr. Fugger, and considering that part of Mr. Fugger's job was to respond to Congressional inquires, I do not credit his testimony that he was unaware of any involvement by Congress, and that he did not speak to Complainant about the Congressional inquires.[84]

C. Protected Activity

An employer violates the whistleblowing protection statutes if it "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any employee" because the employee engaged in protected activity. 29 C.F.R. § 24.2(b) (2002). Concerns that "touch on" the environment can be protected activity. *Dodd v. Polysar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994). This "touch on" requirement refers to the subjects regulated by the pertinent statute. *Nathaniel v. Westinghouse Hanford, Co.*, 91 SWD 2 (Sec'y Feb 1, 1995). *See* Safe Drinking Water Act, 42 U.S.C. § 300g *et. seq.* (2002) (protecting the purity of public drinking water); Water Pollution Prevention and Control Act, 33 U.S.C. § 1251(a) (2002) (stating "the objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the nations waters."); Solid Waste Disposal Act 42 U.S.C. § 6902 (2002) (promoting the protection of health and the environment by, *inter alia*, "assuring hazardous waste management practices are conducted in a manner which protects human health and the environment); Clean Air Act 42 U.S.C. § 7401(b-c) (2002) (protecting the nations air quality to promote public health and welfare and to promote pollution prevention); and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9601 *et. seq*. (2002) (protecting public health and the environment by facilitating cleanup of environmental contamination and imposing costs on the parties responsible for the pollution).

Protected activities that "touch on" the subjects regulated by the pertinent statutes includes statutory protected activity of commencing, testifying or assisting in a proceeding under the statute, 29 C.F.R. § 24.2(b)(1-3) (2002), or by engaging in other acts to further the purpose of the statute. *See Macktal v. Chao*, 286 F.3d 822, 825 (5th Cir. 2002) (finding in an ERA case that an expression of an intent to file an complaint was protected activity); *Dobreuenski v. Associated Universities, Inc.*, 96 ERA 44, p. 9 (ARB June 18, 1998) (participating in a television report about alleged leakage or radioactive waste); *Carson v. Tyler Pipe Co.*, 93 WPA 11 (Sec'y Mar. 24, 1995) (protecting internal safety complaints); *Conley v. McClellan Air Force Base*, 84 WPC 1 (Sec'y Sept. 7, 1993) (protecting

[84] Likewise, I do not credit Mr. Waldrop's statement that he was unaware that Complainant was meeting with OSHA investigators the day after he issued a written warning to her on August 5, 1998. (Tr. 1735). No other employee received a written warning for participating in the AFC Peoples with Disabilities Advisory Counsel, and Mr. Waldrop knew that Complainant was in whistleblowing litigation. (Tr. 1741, 1975).

external safety complaints); *Immanuel v. Wyoming Concrete Industries, Inc.*, 95 WPC 3 (ALJ Oct. 24, 1995) (distributing leaflets at a company picnic raising environmental concerns). While the whistleblowing employee protection provisions and its statutory objectives are construed broadly, *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994), an employee should have more than a mere subjective belief that the environment might be affected. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB April 8, 1997). The provisions do not apply to occupational, racial or other non-environmental concerns. *Odom v. Anchor Lithkemko/Int'l Paper*, 96 WPC 1 (ARB Oct. 10, 1997).

Here, Complainant alleges that she engaged in numerous protected activities:

1) In June 1993, as a contracting officer, Complainant voiced concerns about Superfund environmental regulations, analytical procedures, policies, and practices that wasted funds, created impossibility of performance issues on a Superfund cleanup site;

2) A June 18, 1993 letter to her supervisor, copied to the union president, defending Complainant's actions in reforming a Superfund contract and alleging violations of federal law;[85]

3) Her interference in February and March of 1995, in the bidding process for the North Cavalcade Superfund project that contained faulty contract performance provisions which would result in impossibility of performance issues;

4) Complaining to various members of Congress in May 1995 concerning an EPA OIG investigation of her because of the affirmative action she took in interfering in the North Cavalcade project to avoid impossibility of performance issues before the contract was open for bidding;

5) Filing whistleblowing complaints concerning alleged retaliation and hostile work environment for engaging in what Complainant reasonably believed were protected activities beginning on April 8, 1998;

6) Sharing information with the press about retaliation within the EPA for whistleblowing activities including: a June 10, 1998 letter to the Washington Times alleging EPA retaliation against whistleblowers; participating in a January 29, 1999 General Accounting Office report on the whistleblower on the allegations raised in the Washington times; contributing to a press information packet put out by the National Whistleblower Center detailing her abuse; detailing EPA waste and abuse in the publications other publications such as the Investors Business Daily and the Environmental Insider; and

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[85] According to Complainant, this letter informed her supervisor, Mr. Mills and the Union President, Mr. Yeast, of problems with EPA's regulations and analytical methods and threatened to open up the demonstrated problems to public scrutiny through the courts.

7) Sending information to Congress regarding possible FOIA violations by Respondent EPA concerning the destruction of e-mail back-up tapes in February 2000.

To the extent that Complainant voiced concerns to co-workers and management about Superfund environmental regulations, analytical procedures, policies, and practices that wasted funds, and created impossibility of performance issues that retarded the environmental cleanup of the Southeastern Superfund site in 1993, I find that Complainant engaged in protected activity in furthering the purpose of the pertinent environmental statutes. *See Nathaniel v. Westinghouse Hanford, Co.*, 91 SWD 2 (Sec'y Feb 1, 1995). Likewise, I find that interfering in bidding process for the North Cavalcade Superfund Site to change the analytical methodology and performance standards in an attempt to eliminate an impossibility of performance issue that would retard the environmental cleanup was also a protected activity. *See id*.

Similarly, Complainant's letters to members of Congress concerning the OIG investigation of her that was opened, in part, because of her involvement in the North Cavalcade Superfund site, constitute protected activity because Complainant was both complaining about faulty analytical methodology used in adopting unattainable performance specifications and complaining about Respondents' retaliation against her. *See e.g.* (CX 12 D, p. 4) (writing to Senator Coverdell that Complainant was merely trying to protect the government and superfund from poor scientific methodology). Filing whistleblowing complainants and taking environmental concerns to the media are both protected activity. *See* 29 C.F.R. § 24.2(b)(1) (2002); *Dobreuenski v. Associated Universities, Inc.*, 96 ERA 44, p. 9 (ARB June 18, 1998).

Finally, I find that sending information to Congress regarding possible FOIA violations by Respondent EPA, concerning the destruction of e-mail back-up tapes in February 2000, constituted protected activity. Although Complainant never showed what information was on the backup e-mail tapes and how the destruction of that information specifically violated the purpose of the environmental statutes under which she seeks protection, the fact that the tapes were maintained in the Information Management Branch for EPA Region 4, preponderates the conclusion that some of the information would relate to concerns about environmental contaminants. *See Tyndall v. U.S. Environmental Protection Agency*, 95 CAA 5 (ARB June 14, 1996) (finding that complaining about interference in an OIG investigation of improprieties in awarding a contract to study acid rain was protected activity because interference with the investigation could lead the EPA to rely on studies that understated the effects of acid rain); *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994) (noting that employee protection provision are construed broadly), *Cf. Niedzielski v. Baltimore Gas & Electric Co.*, 2000-ERA-4 (ALJ July 13, 2000) (finding that complaining about insufficient resources to develop an NRC examination for employees entrusted to run a nuclear power plant did not rise to the level of protected activity).

D. Adverse Action

An employer violates a whistleblowing statute when the covered employer "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any

employee. . . ." 29 C.F.R. § 24.2(b) (2002). The Eleventh Circuit discerned a difference between discrimination and adverse action, defining adverse action as "simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone and Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). To be actionable, adverse actions must be more than a mere inconvenience or an alteration of job responsibilities. *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Thus, memoranda of reprimand or counseling that amounts to no more than a mere scolding, without any following disciplinary action, do not rise to the level of adverse action. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1236 (11th Cir. 2001); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066 (ARB Aug. 28, 2001). To be adverse action, the activity must result in a tangible job consequence that a reasonable person under the circumstances would view as a "serious and material change" in the terms, conditions, or privileges of employment.[86] *Davis*, 245 F.3d at 1139-40. A "serious and material change," however does not have to constitute an ultimate employment decision. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11 Cir. 1998).

Instances of adverse action in this case include: 1) reassignment of the Southeastern and Bechtel contracts, demoting Complainant to a contract specialist, detailing her out of the Procurement Section and into the Grants Section, and denying her a promotion through a desk audit; 2) canceling Complainant's contract warrant, transferring Complainant out of her career field and into the Information Management Branch, opening an OIG investigation, issuing a "gag order," and stealing her property; 3) Respondents' refusal to disclose the results of the OIG investigation to Complainant

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[86] In *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, p. 7 (March 30, 2001), the ARB stated:

> The Secretary and this Board often have been guided by cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§§§2000 *et seq*.("Title VII"), where the language used in Title VII is similar to that used in the employee protection provisions of the whistleblower statutes. *See Hobby v. Georgia Power Company*, ARB Nos. 98-166/169, ALJ No. 90-ERA-30, slip op. at 16 and 26 (ARB Feb. 9, 2001). The employee protection provisions of the CAA, TSCA, SDWA, and the ERA all state "[n]o employer may discharge or otherwise discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment." Because Title VII utilizes virtually the same language in describing prohibited discriminatory acts and shares a common statutory origin, we have looked to cases decided under Title VII for guidance regarding the meaning of this phrase. *Martin v. Department of the Army*, ARB No. 96-131, ALJ No. 93-SWD-1, slip op. at 7 (ARB July 30, 1999).

Accordingly, I am guided by the Eleventh Circuit case law under Title VII as to what constitutes adverse action. The most recent expression of what constitutes actionable adverse action in the Eleventh Circuit is that the action must amount to a "serious and material change" in the terms, conditions, or privileges of employment. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239-40 (11th Cir. 2001).

so that a final determination of her actions hung over her head like the "sword of Damocles;" 4) putting Complainant on "display" in the library, shunning, and placing Complainant in a dead-end job that she is not qualified to perform; 5) issuing a written warning; 6) denial of promotion through non-selection; 7) subjecting Complainant to a hostile work environment; and 8) blacklisting and stigmatization of Complainant during discovery in this case and making a "bad faith" settlement offer.

D(1) Demotion to Contract Specialist, Reassignment of Southeastern and Bechtel Contracts, Detail to Grants Section and Denial of Promotion Through a Desk Audit

Demoting Complainant from a contract officer and to a contract specialist, reassigning her contract officer work, detailing her away to work in the Grants Section, and denying a promotion through a desk audit all constitutes adverse employment action. *See Martin v. Department of the Army*, 93 SWD 1 (Sec'y July 13, 1995) (transfer to a less desirable position is adverse action even though there is no loss of salary); *Jayko v. Ohio Environmental Protection Agency*, 1999 CAA 5, p. 76 (ALJ Oct 2, 2000) (stripping complainant of important projects and transferring him constituted adverse action because it striped him of his duties, responsibilities, and prestige that mark advancement); *Kocsis v. Multi-Care Management*, 97 F.3d 876, 885 (6th Cir. 1996) (stating that a transfer can be "materially adverse" when the complainant receives "significantly diminished material responsibilities"). A denial of a promotion through an internal desk audit is also an adverse employment action because it directly concerns pay which is a material term of employment. *See Davis*, 245 F.3d at 1139-40.

D(2) Cancelling Warrant, Job Transfer, OIG Investigation, "Gag Order," and "Stealing"

Second, regarding Respondent EPA's actions in canceling Complainant's contract warrant, transferring Complainant out of her career field and into the Information Management Branch, opening an OIG investigation, issuing a "gag order," and "stealing" her property, I find that these activities constitute actionable adverse actions based on the facts of this case. Upon her reassignment to the Information Management Branch, Complainant was assigned "make work." (Tr. 2216). Because she was no longer in contracting, management suspended her warrant. (EPA 50, p. 1). Transferring Complainant from her chosen field to a position with unknown promotion potential and significantly altered duties constitutes adverse employment action. *See Kocsis*, 97 F.3d at 885 (job transfer).

Regardless of how Mr. Waldrop construed the meaning of the "gag order," Complainant believed that it prohibited her form speaking to anyone about her case and curtailed her First Amendment rights as memorialized in the March 15, 1995 e-mail to Mr. Waldrop. (CX 42, p. 1). Mr. Waldrop never corrected Complainant's interpretation of the "gag order." (Tr. 1921-24). Subjecting Complainant to an administrative order that curtailed her liberty constitutes a materially adverse employment action. *See Connecticut Light & Power Co.*, 85 F.3d 89, 94-95 (2nd Cir. 1996) (restricting an employees ability to cooperate with administrative and judicial bodies through a gag order constitutes adverse action and is against public policy).

Also, Respondent EPA took boxes of materials from Complainant's work station and turned some of the material over to the OIG. (Tr. 2231-34; OIG 15, p. 2). Having managers confiscate property and turn it over to the OIG was outside the normal course of business. (Tr. 373-74, 721, CX 51, p. 1-2). Merely depriving Complainant of access to her work by itself, however, does not rise to level of a materially adverse employment action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (concluding that having property stolen and the resultant anxiety, without more, do not constitute ultimate employment decisions and are therefore not actionable adverse action). Unlike *Mattern*, there is more than a mere deprivation of property by co-workers in this case. Rather, the confiscation of Complainant's property was done on the same day that she was informed of the OIG investigation against her and told to report to her new position on the following work day. The confiscation of her property affected the terms, conditions and privileges of her employment because Complainant was not issued a receipt for the property taken from her and she alleged that she needed the information to defend the allegations the OIG was investigating. Depriving an employee of documents necessary for a defense, without an accounting, could result in a criminal conviction and a resultant loss of job, and thus, it materially affects the terms conditions and privileges of employment. *See Wideman*, 141 F.3d at 1456 (recognizing disagreement with *Mattern* and adopting a rule in the Eleventh Circuit that adverse employment actions do not have to result in an ultimate job consequence).

Likewise, I find that opening an OIG investigation by itself is a materially adverse employment action. *See Marcus v. U.S. Environmental Protection Agency*, 96 CAA 7, p. 38 (ALJ Dec. 15, 1998) (stating in dicta that an OIG investigation would appear to constitute adverse action if motivated by a retaliatory animus). In *Hoffman v. Rubin*, 193 F.3d 959, 964 (8th Cir. 1999), however, the Eighth Circuit came to a different conclusion. In that case, Hoffman, the plaintiff in a Title VII action, alleged that his employer retaliated against him for supporting a co-workers sexual harassment and discrimination claims. *Id*. at 960. The EEO office determined that all of Mr. Hoffman's retaliatory claims were time barred with the exception of his employer's attempt at criminal prosecution for his activity in the Outlaws Motorcycle Club. *Id*. at 962. Eventually, Mr. Hoffman filed suit in federal court where he learned through discovery that he was under investigation for leaking information to the Outlaws. *Id*. The district court ruled, *inter alia*, the Mr. Hoffman failed to present evidence of adverse employment action. *Id*. at 963. The Eighth Circuit agreed that a criminal investigation was not adverse employment action because an investigation is a preliminary and not a final decision, Mr. Hoffman was never aware of the investigation until discovery, and Mr. Hoffman presented no evidence that the investigation was responsible for any change in the terms, conditions, and privileges of employment. *Id*. at 965. The Eighth Circuit further cautioned against "approving a rule of law that would make wrongful a criminal investigation not conducted by the employer and supported by at least some evidence." *Id*.

The OIG investigation of Complainant is easily distinguishable. Apart from the fact that the Eight Circuit only finds ultimate employment decisions actionable, *see Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997), a rule not adopted in the Eleventh Circuit, the case is distinguishable on its facts. First, Complainant knew on March 10, 1995, the same day EPA managers held a group meeting with an OIG agent outlining the allegations against Complainant, that she was under

investigation for criminal wrongdoing. (Tr. 2178-79). Second, the investigation was performed by the employer and not an outside entity in as much as EPA Region 4 and the Office of the Inspector General both serve under the EPA Administrator and Deputy Administrator. Third, the fact that the OIG investigation was not a final decision, did not keep the OIG investigation form having final effects on the terms conditions and privileges of employment. Mr. Waldrop reassigned Complainant to a different branch within the Office of Policy and Management during the pendency of the investigation. (EPA 51, p. 1; EPA 121, p. 5). Also, "in view of the investigation" Mr. Waldrop decided to make Complainant's transfer to the Information Management Branch permanent even though he found no basis for administrative action. (OIG 3, p. 1). Accordingly, under the facts of this case, I find that opening on OIG investigation constituted an adverse employment action materially affecting the terms conditions and privileges of employment.

D(3) Failure to Disclose Results of OIG Investigation

Third, I also find that Respondents' refusal to disclose the results of the OIG investigation to Complainant constituted adverse employment action. An official OIG investigation was opened on March 20, 1995 and Complainant was in regular contact with OIG agents, Congressional members and Region 4's management about the pendency of her suit, its progress, and the investigative report. *See supra* Section II, part E-F. Respondent OIG promised on May 18, 1995 and again on October 18, 1995, in regards to two separate FOIA requests, that it would send Complainant portions of the investigatory as soon as the investigation was completed. (OIG 18, p. 1; OIG 19, p. 1). No personnel from Region 4 or the OIG ever told Complainant that the OIG criminal investigation was finished by June 22, 1995, or that Region 4 determined that there was no basis for administrative action on March 28, 1996. (Tr. 2188). Failing to disclose the results of the investigation deprived Complainant of information necessary to contest her transfer out of her career field, and Complainant testified that holding the investigation over her head prevented her from applying to other jobs because of the unresolved criminal investigation. (Tr. 2230). The chilling affects of an OIG investigation were well documented in the record and the OIG has a policy to handle employee investigations as quickly as possible because "it is not a good thing to have this type of cloud over someone's head for any extended period of time." (Tr. 809).

D(4) Putting on "Display," "Shunning," and Job Placement

Fourth, I do not find that putting Complainant on "display" in the library and "shunning" her, without more, constitutes an adverse employment action because Complainant has made no showing that such activities resulted in a "serious and material change" in the terms, conditions, or privileges of employment. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (holding that hostility from fellow employees does not constitute an ultimate employment decision and thus is not adverse employment action); *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1039 (7th Cir. 1998) (providing that shunning may constitute and adverse employment action when it causes a material harm); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 968-69 (8th Cir. 1999) (shunning by co-workers is not adverse employment action).

Following the meeting of March 10, 1995, Complainant was assigned to the supervision of Jack Sweeny in the Information Management Branch. (OIG 3, p. 1). Complainant related that upon her reassignment she was put on display in the library. (Tr. 2203). The physical space was not bad, but Complainant stated that her reassignment sent a message to all other employees that she was a leper and nobody was to speak with her. (Tr. 2203). Contrary to Complainant's assertions, the current manager of the branch testified that everyone in the Information Management Branch had worked in library at one time. (Tr. 964). The facility was crowded and only two or three private offices existed for employees with everyone else stationed in cubicles. (Tr. 964). Rebecca Kemp, who managed FOIA personnel, testified that her office was in the library. (Tr. 2623, 2626). All new branch employees were first stationed in the library due to a lack of space, and from time to time other employees had work stations in the library. (Tr. 2623-24). Complainant stayed in the library about eighteen months before the Information Management Branch moved locations and she moved into a private office. (Tr. 2212, 2215-16).

Complainant related that Mr. Mills and Mr. Jamison had called Complainant's former project officers and informed other employees that Complainant had committed a criminal act and no one should to speak to her. (Tr. 2204-05). Employees only spoke to Complainant out of the sight of their managers to avoid guilt by association. (Tr. 2208). On February 2, 1997, Complainant reported that Waldrop remarked in a joint counsel meeting that he had better leave when he saw Complainant because she was "trouble." (CX 24, p. 1). Although Complainant was not happy about her work space location and she testified that she was "shunned" I do not find that these facts rise to the level of a "serious and material" change in the terms conditions and privileges of employment to constitute an adverse employment action.

Placing Complainant in a dead-end a job that she is not qualified to perform, however, is a material adverse employment action affecting the terms conditions and privileges of employment because Complainant has no potential for promotion, the job does not fall within her career field, and her lack of qualifications, as compared to the position description, make certain parts of her job impossible to perform. At the hearing, Mr. Barrow testified that Complainant should have a general familiarity with the approximately one-hundred software packages used by the Agency, but Complainant testified that she was only generally familiar with two. (Tr. 2953-55, 2958-61). Complainant simply lacks knowledge of EPA computer systems and the process to devise procedures and methods to re-engineer and automate work processes and integrate information resources management concepts.[87] (EPA 102, p. 3). *See Delaney v. Massachusetts Correctional Industries*, 90 TCS 2 (Sec'y March 17, 1995) (finding that a transfer to a position for which the complainant was not qualified was an adverse employment action).

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[87] Complainant further alleged that Respondents forced Complainant to violate the anti-deficiency act by telling her to spend money and incur expenses not yet committed in connection with her IAG contract management duties as the Information Resources Coordinator. Problems with the IAG contract management is well known to EPA managers. No adverse action has ever been taken against Complainant for a failure to be able to reconcile problems related to management of this contract.

D(5) Issuance of a Written Warning

On August 5, 1998, Mr. White and Mr. Waldrop approached Mr. Barrow concerning Complainant's behavior and involvement with the Advisory Counsel, and asked him to sign a written warning admonishing Complainant that she could not continue her activities on official Agency time. (Tr. 535-39). The specific allegations against Complainant were provided by Mr. White and included: directly contacting GSA on July 12, 1998, about EPA renovations and refusing to direct those concerns to Mr. White when requested to do so; demanding of GSA on July 8, 1998, that an EPA ADA representative be appointed on a committee; going directly to GSA demanding more handicap spaces; making representations on behalf of the agency on behalf of persons with disabilities when she was not the official representative on official duty time; involving herself with the AFC Peoples With Disabilities Advisory Counsel; and using loud and offensive language toward other employees. (Tr. 1741, 2723; EPA 103, p. 3-4).

Mr. Barrow could not recall Mr. Waldrop ever asking him to sign a memo relating to any other employee. (Tr. 541). Interestingly, the written warning was issued to Complainant one day before she was scheduled to meet with an OSHA investigator about her whistleblowing complaint. (Tr. 1735). Complainant was not given a chance to defend her actions or show documentation before she was issued the written warning letter. (Tr. 2260, 3018). Even if all the allegations in the written warning were false, the written warning does not constitute adverse employment action because it specifically states that it is not disciplinary action and I find that it did not constitute a "serious and material" change in the terms, conditions, or privileges of employment. *See Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066 (ARB Aug. 28, 2001) (finding that a memorandum of reprimand that amounts to a mere scolding without any following disciplinary action does not rise to the level of adverse action).

D(6) Denial of Promotion Through Non–Selection

Generally, an employer is free not to hire any individual as long as that non-selection is not based on a discriminatory motive forbidden by law. *Frady v. Tennessee Valley Authority*, 92-ERA-19 (Sec'y Oct. 23, 1995), citing, *Samodurov v. General Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993)(slip op. at 10). Accordingly to establish that a failure to select Complainant for the positions she applied for constituted adverse employment action, Complainant must show that:

1. Complainant was qualified for such a position,
2. That despite Complainant's qualifications she was rejected, and
3. That Respondent continued to seek and/or select similarly qualified applicants.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See also Samodurov v. General Physics Corp.*, 89 ERA 20 (Sec'y Nov. 16, 1993) (applying framework established by *McDonnell Douglas Corp*. to whistleblowing actions based on non-selection).

Regarding the jobs Complainant applied for on July 17, 1997 (procurement specialist), November 5, 1997, (procurement specialist), August 1, 2000 (two positions as a contract specialist), and January 19, 2001, (contract specialist), no selection was made among the candidates and Complainant made no showing that the positions remained open after she was rejected. *Hasan v. Florida Power & Light Co.*, ARB No. 01-004 (ARB May 17, 2001). Thus, Complainant failed to show that her non selection for these positions constituted adverse employment action.

For the procurement specialist position that Complainant applied for on November 5, 1997, Mr. Mills selected Jeffery Napier on March 2, 1998. (EPA 63, p. 1). Complainant was one of five "highly qualified" applicants for the position. (EPA 63, p. 1). Likewise Complainant was rated "qualified" based on her May 8, 1998 application for a contract specialist position for which Mr. Mills selected Charles Hays on July 27, 1998. (EPA 66, p. 1-2). Complainant was also among the list of names referred for consideration for the detail she applied for on June 23, 2000 for which Mr. Robbins selected Jeffery Napier and Fran Harrell on September 1, 2000. (EPA 75, p. 1). When Mr. Mills hired Anita Wender on October 16, 2000, Complainant was one of only three "highly qualified" applicants. (EPA 76, p. 1-2). Complainant was one of five candidates referred for consideration based on her February 2, 2001 application, but Mr. Mills hired Fran Harrell and Jeffery Napier on March 5, 2001. (EPA 61, p. 1) Finally, Complainant was one of six candidates referred for consideration based on her May 24, 2001 application for a detail position that Mr. Mills gave to Sharonita Byars on July 25, 2001. (EPA 84, p. 1). Accordingly, Complainant established that she was subject to a materially adverse employment action in not being selected for the above positions for which she was qualified and rejected in favor of another candidate.

D(6) Hostile Work Environment

Adverse employment action can include the creation of a hostile work environment. *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995) (finding a hostile work environment when employees were instructed not to talk to the complainant, called the complainant "inept" and a "s.o.b." and the prevailing attitude was a "loss of trust" directed toward complainant). The Secretary of Labor approved of importing the concept of hostile work environment from employment discrimination cases based on race and sex in violation of Title VII of the Civil Rights Act of 1964 in to the whistleblowing statutes. *Varnadore v. Oak Ridge Nat'l Laboratory*, 92-CAA-2 (Sec'y Jan. 26, 1996) (reissued with non-substantive changes on Feb. 5, 1996). Unlike adverse employment action a tangible job detriment is not a required element in a hostile work environment case. *Id*. at 92, n.93. Accordingly, to prove the existence of a hostile work environment, in the Eleventh Circuit, a complainant must show:

(1) The employee belongs to a protected group;
(2) The employee was subject to unwelcome harassment;
(3) The harassment was based on a protected characteristic of the employee;[88]

[88] This element is more fully discussed fully *infra*, Section III, Part F(6), in determining whether adverse action against Complainant was motivated by her engagement in protected

(4) The harassment was severe or pervasive enough to alter the terms and conditions of employment to create a discriminatorily abusive working environment; and
(5) The employer is responsible through either direct or vicarious liability.

Miller v. Kentworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). *See also Rojas v. Florida*, 285 F.3d 1339, 1344 (11th Cir. 2002) (stating that to establish hostile working environment a plaintiff must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.") (citation omitted).

Here, there is no dispute that Complainant belongs to a member of a protected group under the environmental whistleblowing laws. To show unwelcome harassment Complainant points to the following acts by Respondent EPA:

1) Removal of Complainant from the Southeastern and Bechtel contracts in August and October 1993, demotion from a contract officer to a contract specialist and assignment to a detail in the Grants Section, and removal of another contract in May 1994 citing the fact that Complainant was detailed to Grants;

2) Making notations in the Southeastern contract concerning Complainant's performance and not allowing Complainant to defend her actions in the file while subjecting her to excessive scrutiny and criticism;

3) Denial of a promotion through a desk audit in December 1993 due to the fact that management had reassigned Complainant's contracts to other workers;

4) Extending Complainant's assignment to Grants in July and November 1994 intending to remove Complainant form all contracting matters;

5) Initiating an OIG investigation in March 1995, without giving Complainant a chance to defend her actions, making false statements to the OIG investigator, and misleading her into believing the OIG investigation was still open until October 1998 when the U.S. attorney had declined prosecution in June 1995 and the case was officially closed in May 1996;

6) Issuing a "gag order" not to speak about her case with other employees, denying her access to the contract file room;

7) Confiscating and stealing her the materials in her work space and turning some of that material over to the OIG without an inventory or an accounting;

8) Transferring Complainant out of her career field and into the Information Management

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activity.

Branch in March 1995, making that reassignment permanent in March 1996, and providing her with a job she was not qualified to perform;

9) Ostracizing Complainant by putting her on display in the library for eighteen months in the Information Management Branch and assigning her "make work;"

10) Shunning Complainant in the Information Management Branch;

11) Placing Complainant in a job that she was not qualified to perform, with work assignment managers that refused to work with Complainant and preferred to go behind her back to get authorization for their activities;

12) Issuing a written warning for her activities with the AFC Peoples with Disabilities Advisor Counsel in August 1998;

13) Subjecting Complainant to a "din of hostile remarks" in a February 2000 Information Management Branch Meeting after Complainant leaked information to Congress regarding destruction of EPA records; and

14) Removal of flexiplace in March 2000 and May 2001, taking photographs of her office, searching and confiscating items from her office.

Further evidence of a hostile working environment was presented through the testimony of EPA contractor, Robert Place. He personally witnessed behavior of other employees that undermined Complainant's behavior and he witnessed other employees make obscene gestures toward Complainant when her back was turned. (Tr. 275-77). Mr. Place stated:

> Nobody wants to talk about her at the EPA. Go ask somebody at the EPA about Sharyn Erickson. You won't get much of a response. They just acknowledge that she exists at all. (sic). It's not natural. Somebody - - somebody in the EPA organizational structure is managing that. It's not normal for a group of human beings when you put them in a common work environment for them to gang up against one and shun them. Brutal. . . . Avoiding her, not communicating with her not keeping her informed, I mean, it's absolutely bizarre. I mean, I went in there and pulled an employee off the task. She didn't even know there was a problem.

(Tr. 348-49).

Complainant further alleges that Respondent EPA continued to exhibit a hostile attitude toward her during this litigation by: denying her access to documents during discovery; blacklisting her by calling her "paranoid;" attempting to subject her to a "gag order," bringing a disqualification motion against her attorney, and making a "bad faith" settlement offer.

To show that the harassment was severe or pervasive enough to alter the terms and conditions of employment to create a discriminatorily abusive working environment a complainant must show more than that she was merely unwelcome at work. *Rojas v. Florida*, 285 F.3d 1339, 1344 (11 Cir. 2002) (finding that treating an employee "cooly" and making her feel "unwelcome" is not sufficient to establish hostile work environment). *Cf. Smith v. Esicorp, Inc.*, 93 ERA 16 (Sec'y March 13, 1996) (stating that no tangible psychological injury is required to show hostile work environment). "In evaluating the objective severity of the harassment, we consider, among other factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Miller v. Kentworth of Dothan, Inc.*, 277 F. 3d 1269, 1276 (11th Cir. 2002) (citing *Allen v. Tyson Foods*, 121 F.3d 642, 647 (11th Cir. 1997). Furthermore, harassment is severe and pervasive only if it meets both subjective and objective tests. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999). "Harassment is subjectively severe and pervasive if the complaining employee perceives the harassment as severe and pervasive, and harassment is objectively severe and pervasive if a reasonable person in the plaintiff's position would adjudge the harassment severe and pervasive." *Johnson v. Booker T, Washington Broadcasting Services, Inc.*, 234 F.3d 501, 509 (11th Cir. 2000). No single factor is controlling, however, because the court should focus on the totality of the circumstances rather than isolated incidences. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999). To be actionable, derogatory epitaphs must be permeated with discriminatory intimidation, ridicule, and insult, and be more than an occasional comment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 2284, 141 L. Ed. 2d 662 (1998).

In determining whether Respondent EPA's treatment of Complainant was pervasive and regular, I note that once Complainant was demoted, detailed, and reassigned away form her chosen profession in contracting, the work she performed in the new position/detail cannot form the basis of a continuing hostile work environment because hostile work environment concerns her individual treatment and not the nature of the new work. *English v. General Electric Co.*, 85 ERA 2 (Sec'y Feb 13,1992). However, I find that Respondent EPA's failure to inform Complainant about the results of her OIG investigation and of its failure to find any basis for administrative action constitutes a continuing act of hostile work environment directed at Complainant. This act began on March 10, 1995, the date Complainant's managers began an OIG investigation into Complainant's activities based, in part, on false assertions, subjected Complainant to a "gag order" without explaining its parameters, and removed Complainant form her career field; and it continued until February 1, 2000, the date EPA Region 4, responded to Complainant's FOIA request regarding the OIG investigation. (Tr. 2188; OIG 2, p. 1-2; CX 12 X(2), p. 1). The severity of this conduct was well documented at trial with Agent Dashiell recognizing the detrimental effect on an employee of a pending OIG investigation and stating that the OIG tried to resolve investigations as quickly as possible because "it is not a good thing to have this type of cloud over someone's head for any extended period of time." (Tr. 809). The conduct detrimentally affected Complainant because it helped to deprive her of the means to contest her transfer to the Information Management Branch, it chilled her ability to apply for another government job, and the uncertainty helped to create anxiety and stress as documented by Dr. Patterson. (Tr. 2230; CX 50 A, p. 1). The chilling affect of having an OIG

investigation hanging over one's head would interfere with Complainant's job performance. Agent Mullis testified that he thought the OIG investigation was referred to him because management was attempting to put controls on Complainant's activities. (Tr. 425-28). Living with the nagging doubt about whether one would be subject to criminal and/or administrative action, which could result in a loss of liberty and means of economic support, is sufficiently severe and pervasive on both a subjective and an objective basis.

As discussed, *supra*, Section III, Part D(2), removing Complainant from contracting and placing her in the Information Management Branch constitutes adverse action in its own right. While the work she performed cannot for the basis for a hostile work environment, *English v. General Electric Co.*, 85 ERA 2 (Sec'y Feb 13,1992), the Court may consider the pervasive actions of Ron Barrow in keeping her in the position as an Information Resources Coordinator. What was pervasive and regular was Mr. Barrow's refusal to remove her from that job, when he knew that she was not qualified to perform the job as intended in the position description, when contractors had specifically asked him to remove Complainant due to her lack of knowledge, when Complainant asked for different work, and when he did not affirmatively end the practice of having work assignment manages come to him for authorization. (Tr. 295, 506-07, 516, 2225, 2936, EPA 102, p. 2).

Understanding that Complainant's management wanted to put some controls into effect regarding Complainant's behavior, sheds light on other acts of harassment undertaken by Complainant's managers. For example, management's harassment of Complainant included: removing Complainant from the Southeastern and Bechtel contracts in August and October 1993, demoting her to a contract specialist and then transferring her to the Grants Section where management intended to permanently keep Complainant out of contracts. Issuing a "gag order" and denying Complainant access to the contract file room, and taking documentation form her work space furthered the purpose of informing Complainant that her activity would not be tolerated and helped to reestablish control by management. Eventually, Complainant ended up with a job in the Information Management Branch that she was not qualified to perform and upper management let Mr. Barrow know that Complainant was not to be removed from that position. (Tr. 264). When Mr. Waldrop saw that Complainant was beginning to overstep her bounds again in 1998 concerning her participation in the AFC Peoples with Disabilities Advisory Counsel, he attempted to control Complainant's activity again by issuing a written warning letter.

Similarly, Complainant established that her day to day work as the Information Resources Coordinator subjected her to pervasive and regular harassment that altered the terms and conditions of employment to create a discriminatorily abusive working environment. Her job description provided that she was responsible for analysis and troubleshooting with regards to the delivery of contractor services and the position required technical computer expertise. (Tr. 978, 2220-21; EPA 102, p. 2). Even crediting Mr. Barrow's assertion that Complainant need only have a general knowledge of approximately one-hundred computer software packages used by the Agency, Complainant testified that she was only generally familiar with two software programs. (Tr. 979, 2935, 2953-61). Mr. Place testified that he had never met another point-of-contact personnel with less knowledge, and he had personally asked Mr. Barrow to remove Complainant from the position.

(Tr. 263). The fact that Complainant was the point of contact for all computer contractors and did not know what was going on made EPA Region 4 a "dysfunctional" organization from the perspective of computer contract workers. (Tr. 268). Mr. Place discharged several of his employees who were unwilling to work with Complainant and unwilling to work in the environment at the EPA. (Tr. 275-76).

Complainant had several work assignment managers that worked under her who had the technical knowledge to perform the actual tasks and they were supposed to report to Complainant regarding all computer work EPA contracted out. (Tr. 515). The work assignment managers did not help Complainant perform her job, however, because they continued to go behind her back in attempts to get contractors to undertake personnel actions, and attempted to circumvent Complainant by going directly to Mr. Barrow, who had the same authority as Complainant. (Tr. 275, 515-16, 2223, 2936). Mr. Barrow testified that he tried to discourage such behavior but could not stop it, and he attempted to make sure that Complainant had already cleared the proposed action. (Tr. 516, 2225, 2936). Mr. Place personally observed hostility directed toward Complainant in the from of eye rolling, shunning, and ugly gestures. (Tr. 267, 279, 314, 347-49).

As management of contractor services was an everyday part of Complainant's job, the hostility directed toward her was frequent. While the severity of the conduct in rolling the eyes, shunning and making ugly gestures may not be severe and may constitute merely offensive utterances, the impact that the conduct has on Complainant's work is severely damaging. Lacking the technical knowledge to understand what needs to be done on her own, Complainant must rely on the knowledge of her work assignment managers. Complainant cannot adequately perform her job when she is not informed about what was happening. A reasonable person, deprived of the information necessary to perform one's job adequately would find the hostility directed toward Complainant objectively severe and pervasive.

I do not find that other instances of hostility that Complainant cites rises to the level of a severe or pervasive action that alters the terms and conditions of employment to create a discriminatorily abusive working environment. Specifically, the evidence elicited at trial failed to establish that Complainant was put on display and ostracized in the library for eighteen months on her reassignment to the Information Management Branch. Rather, everyone in the Information Management Branch had worked in library at one time, and all new branch employees were first stationed in the library due to a lack of space. (Tr. 964, 2623-24). From time to time other employees had work stations in the library. (Tr. 2623-24). The facility was crowed and there were only two or three private offices for employees with everyone else stationed in cubicles. (Tr. 964). Rebecca Kemp, who managed FOIA personnel, testified that her office was in the library. (Tr. 2623, 2626). When the branch moved locations in 1996, Mr. Barrow provided Complainant with one of the few private offices to accommodate her carpal tunnel disability. (Tr. 966-67).

Similarly, I find insufficient evidence to establish that Complainant was subjected to a "din of hostile remarks" in a February 2000 branch meeting regarding her Congressional leak about the destruction of E-mail backup tapes. FOIA specialist, Marilyn Brinson, merely stood up and stated that

she wished that the person who initiated the Congressional inquiry would speak with the FOIA office before going to Congress. (Tr. 1051, 2635, 2766, 2774-75). Complainant stated that nobody identified her by name. (Tr. 3031-32). Complainant specifically remembered Rich Shekel, Ron Barrow and Rebecca Kemp, among the dozen meeting attendees, making comments that concerns should be kept internally. (Tr. 3032-33). Both Ms. Kemp and Mr. Barrow testified that no one at the meeting was openly hostile and they related that Complainant was never singled out. (Tr.1051-52, 1060 2635, 2682). This one incident involving FOIA personnel, even if employees were openly hostile toward Complainant and management did nothing to say that Complainant's activities were protected, is not a severe or pervasive action that alters the terms and conditions of employment to create a discriminatorily abusive workplace environment.[89]

Finally, I note that Mr. Barrow's removal of flexiplace privileges in March 2000 and May 2001, his photographing of her office and "confiscating" items does not rise to the level of severe or pervasive harassment that alters the terms and conditions of employment to create a discriminatorily abusive working environment. Complainant merely asserted that documents related to her litigation were stolen form her work station sometime during 2000-01, but did not offer any corroborating evidence. (Tr. 2986-89). Complainant was unclear on exactly who stole what and she was not sure on when the documents were taken and as such I find that she failed to meet her burden of persuasion with regard to the stolen documents. (Tr. 2986-89). Mr. Barrow only suspended her flexiplace twice and he only photographed her office after she had refused to comply with his order to straighten out her files. (Tr. 520; EPA 113, p. 2; EPA 114, p. 2). Flexiplace is a privilege that may be removed at the manager's prerogative. (Tr. 1002). No evidence was introduced to show that denial of flexiplace was a severe action, that it was humiliating, or that the activity interfered with Complainant's job performance.[90]

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[89] I also note that the "din of hostile remarks" in the branch meeting concerning Complainant's protected activity in going to Congress regarding the destruction of EPA records, does not constitute adverse employment action in its own right because Complainant made no showing that the action resulted in any tangible job consequence that a reasonable person under the circumstances would view as a serious and material change in the terms, conditions, or privileges of employment. Complainant learned of the destruction of records through a branch wide memo, and she made no showing, through a temporal proximity or otherwise, that that her removal form FOIA was at all related to her protected activity.

[90] In the alternative I find that Mr. Barrows actions were not motivated by a retaliatory animus. Mr. Barrow ordered Complainant to clean her office in February 2000, because he was worried about a potential OIG audit of the IAG records. (Tr. 520; EPA 113, p. 4). When Complainant still had not complied by March 10, 2000, Mr. Barrow revoked flexiplace privileges. (EPA 113, p. 2). On August 3, 2000, Complainant had complied with Mr. Barrow's instruction and he restored flexiplace privileges. The mere fact that Mr. Barrow knew that Complainant was a whistleblower and the fact that Complainant had documentation related to her whistleblower litigation in her office that was contributing to the clutter does not establish by a preponderance of the evidence that Mr. Barrow denied her flexiplace because of her protected activity of engaging

Finally, an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662 (1998). An employer is strictly liable for the hostile work environment if a supervisor takes tangible employment action against the victim. *Id*. at 807. An employer may raise affirmative defenses to vicarious liability where there is no tangible employment action if the employer exercised reasonable care to prevent and correct promptly the harassing behavior, and that the victim unreasonably failed to take advantage of corrective opportunities to avoid the harm. *Id*. When an employee is harassed by a co-worker, the employer may only be held liable if the employer knew or should have known of the harassing conduct and failed to take prompt remedial action. *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000); *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2, p. 43 (ARB June 14, 1996).

In both instances of hostile work environment outlined above - that related to Complainant's removal from contracts, the institution and non-disclosure of the OIG investigation, as well as the hostility exhibited toward Complainant by the work assignment managers - I find that there is vicarious liability. In the first instance of hostile work environment, which began with the1995 OIG investigation and the subsequent refusal to inform Complainant that the OIG investigation was over, management took the hostile actions against Complainant. In the second instance, where work assignment managers refused to work with Complainant and exhibited hostile behavior toward Complainant, Mr. Barrow knew of the activity and failed to take proper remedial action. Mr. Barrow testified that he tried to discourage work assignment managers form going behind Complainant's back and undermining her authority, but he did nothing to stop the behavior. (Tr. 515-16, 2225, 2936). Mr. Place personally told Mr. Barrow that there was a damaging problem. (Tr. 269). In contrast to Mr. Barrow's actions, Mr. Place testified that he fired some personnel who refused to work with Complainant. (Tr. 275-76). I do not find that Complainant's managers in either instance sufficiently departed from their mandate to act as an agent of the employer so that vicarious liability on behalf of Respondent EPA would be defeated.

D(7) Blacklisting, Stigmatization and "Bad Faith" Settlement Offer

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in whistleblower litigation. Mr. Barrow simply did not have a retaliatory animus because I find his instruction regarding the IAG files, with the threat of an impending OIG audit of those files, and the complete disarray of Complainant's office, justified his management actions.

Similarly, I find that Complainant failed to establish that Mr. Barrow's denied her flexiplace in May 2001 because she engaged in protected activity. Complainant had spend much of her time at home trying to fix her personal computer and she indicated to Mr. Barrow that she did not have enough work to stay busy as a result of the Agency "idling" her. This was the first time that Mr. Barrow had ever heard the term "idling" in the employment context. (Tr. 530). Complainant also failed to show that she was treated differently than other employees.

Complainant finally asserts that Respondent EPA's conduct during discovery constituted an adverse employment action by blacklisting her, stigmatizing her and by attempting to have her accept a "bad faith settlement" offer. Specifically, Complainant alleges that an EPA attorney called her "paranoid" during discussions with the Court, and that the Respondents' settlement offer constituted an illegal "gag order"

The fact that an EPA attorney called Complainant "paranoid" does not constitute a serious and material change in the terms conditions or privileges of employment which is necessary to find an adverse employment action. Furthermore, even considered in the light of a hostile working environment, it is not enough to allege that an EPA attorney had a negative reaction to Complainant caused by communications with Respondents, rather, the Complainant must show that the blacklisting remark contributed to a hostile work environment. *Varnadore v. Oak Ridge National Laboratory*, 92 CAA 2, p. 6 (ARB June 14, 1996). I do not find that the "paranoid" comment, made by a person who did not work in the same office as Complainant, was severe, frequent, or unreasonably interfered with Complainant's job performance. A reasonable person under the circumstances would not find the comment severe and pervasive.

Likewise, Respondents' settlement offer does not constitute adverse employment action. Tough negotiating does not equate to bad faith retaliation and the institution of a "gag order" provision does not automatically violate public policy or constitute an adverse employment action. *Rudd v. Westinghouse Hanford Co.*, 88 ERA 33, p. 82-83 (ALJ March 15, 1996) (finding tough negotiating does not equate to bad faith retaliation), *approving settlement* ARB Nos. 99-023, 99-028, p. 8 (April 18, 2002) (declining to adopt ALJ's findings that the "gag order" in the settlement contradicted public policy and constituted an adverse employment action). Although the settlement agreement, which provided for Complainant's early retirement and a confidentiality agreement, would constitute a material change in the terms conditions and privileges of employment, it was not an adverse action because it required Complainant's consent at arms length negotiations when Complainant was represented by an attorney. Also, Complainant rejected the settlement agreement. Likewise, the settlement agreement failed to constitute an adverse employment action in the context of hostile work environment. A settlement offer is not a frequent occurrence; is not physically threatening, humiliating, or an offensive utterance; and does not interfere with an employees job performance.

E. Knowledge of Protected Activity

The employer must have actual or constructive knowledge of a complainant's protected activities before the employer can be held liable for violating environmental whistleblowing laws. *Morris v. American Inspection Co.*, 92-ERA-5 (Sec'y Dec. 15, 1992); *Adjiri v. Emory Univ.*, 97-ERA-36 (ARB July 14, 1998). Knowledge of protected activity cannot be imputed to higher management without proof. *Mosley v. Carolina Power & Light Co.*, 1994-ERA-23 (ARB August 23, 1996). Here, Mr. Mills was Complainant's supervisor while she worked in the Contracts section of the EPA. As such, Mr. Mills had actual knowledge of her dealings in the Southeastern contract

with OHM in 1993 to resolve impossibility of performance issues. Mr. Waldrop, Jamison, and Springer as well Ms. Harris and Maxwell all had knowledge of Complainant activities in the Southeastern contract, knowledge of Complainant's course of action with the contractor Bechtel, and knowledge of her interference in 1995 in the Region 6 North Cavalcade superfund site because they were all privy to the report prepared by Leslie Bell detailing those activities and they initiated the OIG investigation based on those facts. Jack Sweeny knew that Complainant was transferred to the Information Management Branch pending an OIG investigation. Ron Barrow knew that Complainant's removal from contracts was pursuant to a grievance and that he could not remove her from her present position. In 1998, Mr. Barrow had actual knowledge that Complainant was a whistleblower after Complainant informed him of that fact. Respondent OIG had knowledge of Complainant's protected activity because it conducted the investigation into Complainant's activities and it was the recipient of Congressional inquiries concerning the propriety of the investigation. Accordingly, all of Complainant's supervisors, at some point in time, had knowledge that Complainant had engaged in protected activity.

F. Adverse Employment Action Motivated by Protected Activity

An employee can prevail in showing that adverse employment action was motivated by protected activity where there is direct evidence of discrimination. *TWA v. Thurston*, 469 U.S. 111, 121 (1985); *Walker v. Prudential Property & Casualty Insurance Co.*, 286 F.3d 1270, 1274 (11 Cir. 2002). Direct evidence of discrimination is evidence that "will prove the particular fact in question without reliance on inference or presumption." *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999). Such "evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." *Id*.

In the absence of direct evidence of discrimination, a complainant makes out a *prima facie* case of retaliation by showing he or she is a member of a protected class, that he or she engaged in protected activity, that the respondent took adverse action, and that the respondent had knowledge of his or her protected activity. The threshold for establishing a prima facie case is low and the amount of evidence needed to "infinitely less than what a directed verdict demands." *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 2751, 125 L. Ed. 2d 407 (1993). The burden then shifts to the respondent to produce legitimate nondiscriminatory reasons for taking the adverse employment action. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000); *Walker v. Prudential Property & Casualty Insurance Co.*, 286 F.3d 1270, 1274 (11 Cir. 2002). *C. f.* 42 U.S.C. § 5851(b)(3)(B) (2002) (stating that in ERA cases the employer must show by "clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence" of any protected activity); *Dysert v. United States Secretary of* Labor, 105 F.3d 607 (11th Cir. 1997). The respondent's burden is one of production and not of persuasion. *Reeves*, 530 U.S. at 142-43. Once the respondent offers legitimate nondiscriminatory reasons for taking the adverse employment action, the complainant has the opportunity to show that the respondent's reasons for the adverse employment action are not worthy of credence, but the complainant still maintains the burden of establishing discrimination by a preponderance of the

evidence should the respondents asserted reasons be discredited. *Hicks*, 509 U.S. at 517-18.

Once the respondent offers a legitimate nondiscriminatory reason for taking adverse employment action, the presumptions and burden shifting disappear and the complainant is left with the ultimate burden of persuasion by a preponderance of the evidence to show that the respondent's actions were motivated by a retaliatory animus. *Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 516 (explaining that the complainant's burden to attack the legitimate nondiscriminatory reasons set forth by the respondents merges with the ultimate burden of persuading the court that the complainant is the victim of intentional discrimination). A complainant may meet the ultimate burden of persuasion through circumstantial evidence. *Bartlik v. Tennessee Valley Auth.*, 88 ERA-15 (Sec'y April 7, 1993), *aff'd sub. nom. Bartlik v. U.S. Dept of Labor*, 73 F.3d 100 (6th Cir. 1996). When using circumstantial evidence, however, the complainant must show intentional discrimination. *Leveille v. New York Air Nat'l Guard*, 94-TSC-3 (Sec'y Dec. 1, 1995).

Complainant argues that dual motives analysis is not appropriate because there is direct evidence of retaliation against Complainant for engaging in protected activities. Complainant argues that: she is a credible witness; Respondents' deleted and back dated portions of Ms. Bell's memorandum outlining allegations against Complainant; EPA did not justify the commencement of an OIG investigation, and commenced the investigation on mistaken assumptions that blacklisted Complainant; EPA did not take administrative action on the OIG's referral within the requested thirty days; Mr. Waldrop subjected Complainant to a "gag order," and did not clarify his order after receiving Complainant's correspondence questioning its scope; and evidence produced at trial showed that Mr. Waldrop did not like Complainant.

Contrary to Complainant's assertions, I do not find direct evidence of retaliatory intent because to find discriminatory intent based on the above actions requires inference and presumption. No evidence in the record unequivocally states that Respondent's retaliated against Complainant because of her protected activity. Accordingly, I find that engaging in a dual motive analysis is appropriate.

Because this case was fully tried on the merits, I find it appropriate to combine a full analysis of Complainant's *prima facie* case of retaliatory animus with Respondents' burden to show legitimate nondiscriminatory reasons for undertaking adverse employment action with Complainant's ultimate burden of persuasion. *See Adjiri v. Emory University*, 97 ERA 36, p. 6 (ARB July 14, 1998) (stating that it is not necessary to go through the burden shifting analysis once the respondents show a legitimate nondiscriminatory reason for undertaking a personnel action, rather the question is whether the complainant prevailed on the ultimate question of liability); *Ilgenfritz v. United States Coast Guard Academy*, 99 WPC 3 (ALJ March 30, 1999).

F(1) Demotion to Contract Specialist, Reassignment of Bechtel and Southeastern Contracts, Detail to the Grants Section, and Denial of Promotion Through a Desk Audit

Although I found the Complainant's demotion to a contract specialist, the reassignment of her contracts and her detail to the Grants Section to be adverse employment action, I do not find that the actions were motivated by a retaliatory animus. Mr. Mills reassigned the Southeastern contract in 1993 because he had a dispute with Complainant over how to document the contract file. The fact that Complainant identified a performance specification in the contract that gave rise to an impossibility that could have cost the government millions of dollars was irrelevant to Mr. Mills's actions. Mr. Mills merely voiced concern about documenting a $500,000 increase in the price of the contract and questioned Complainant's after hours conversations with the contractor and the fact that the price increase was purposefully set at less than $500,000 to avoid the need for an audit. (Tr. 2125; EPA 1, p. 1-2). After Complainant became upset, and sent an inflammatory e-mail on June 17, 1993, inferring that Mr. Mills had called her stupid and had bombarded her with insulting comments, Mr. Mills stated that he was getting involved in the contract to see what was happening. (EPA 2-5).

Mr. Mills requested that Complainant do a profit/fee analysis in June, 1993, and Complainant did not comply with that request until August 26, 1993, and then she only wrote that preforming the detailed analysis that Mr. Mills wanted was unnecessary. (Tr. 1482, 1664; EPA 12, p. 1). Mr. Mills directed Complainant to redo the analysis and on September 7, 1993 Complainant partially complied by performing the analysis but not putting it in a memo format as Mr. Mills directed. (Tr. 2127; EPA 14, p. 1). When Complainant argued with Mr. Mills over his requirements a third time, Mr. Mills informed Complainant on October 20, 1993 that he was now the contracting officer and Complainant was the contracting specialist. (Tr. 1488; EPA 20, p. 1). There is no showing that Mr. Mills demoted Complainant and reassigned the contract because Complainant had voiced concerns about Superfund regulations, analytical procedures, policies, and practices that wasted funds, and created impossibility of performance issues with regard to Superfund cleanup site. Rather, I find that Complainant's demotion to a contract specialist and the reassignment of the Southeastern contract were a result of a dispute over how to document contracting files and Complainant's insubordination in refusing to follow a simple order by her supervisor simply because she did not think the requirement was necessary.

Likewise, I do not find that the reassignment of the Bechtel contract in October 1993, was in retaliation for protected activity. On August 30, 1993, Mr. Mills articulated three faults with Complainant's handling of the file: 1) Complainant discussed her opinion on indemnification issues with Bechtel - an agency issue that must be coordinated with headquarters; 2) Complainant took a position on indemnification applied in Region 9 and made it apply to Region 4 without any legal opinion; and 3) Complainant negotiated with Bechtel on issues that did not agree with the EPA position and lied to her supervisors that Region 9 supported her position. (EPA 13, p. 1-2). Also, prior to reassigning the Bechtel file, Complainant had filed a FLRA grievance against Mr. Mills, which was the only grievance Mr. Mills ever had filed against him. (Tr. EPA 25, p. 1-2). Regardless of whether Mr. Mills understood the distinct issues of indemnification and federal facilities in the Bechtel contracts with EPA, and regardless of whether Complainant asserted a correct position on the Bechtel issues, Mr. Mills believed Complainant was mishandling the contract. Complainant did

not present sufficient evidence to show that the reassignment of the Bechtel contract was in retaliation for her protected activity in regards to the impossibility of performance issue in the Southeastern contract.

Determining that Complainant's contracts were not reassigned because her supervisors were retaliating for environmental protected activity compels the conclusion that Complainant's denial of promotion through a desk audit was not motivated by a retaliatory animus for engaging in protected environmental activity. Management denied Complainant a promotion through a desk audit on the basis that she did not have sufficient work to warrant the increase in pay. (Tr. 2284; EPA 39-40). Finally, failing to show that the Southeastern and Bechtel contracts were reassigned based on retaliation for protected activity, Complainant failed to establish by a preponderance of the evidence that her detail to the Grants Section was motivated by a retaliatory animus. Far from being retaliatory, one of Complainant's tasks was to review all of Region 4's contracts to ensure that no other contract had an impossibility of performance issue similar to that of the Southeastern contract. (Tr. 2164).

F(2) Cancelling Contract Warrant, Job Transfer, OIG Investigation, "Gag Order," and "Stealing"

Contrary to events in 1993, I find that management's cancellation of Complainant's contract warrant, transferring her to the Information Management Branch, initiating an OIG investigation and "stealing" were all retaliatory acts for Complainant's protected activity in contacting Region 6 and interfering in the North Cavalcade Superfund project. Complainant jumped the established chain of command[91] in directly interfering in the North Cavalcade project and acted unilaterally in an attempt to avoid an eventual contract breakdown resulting in the Superfund site not being cleaned up timely and resulting in the loss of millions of dollars by the government. As a result Complainant was "investigated" by the Office of Regional Counsel, her contract warrant was cancelled, an OIG investigation was opened and Complainant was transferred out of her career field.

Respondent EPA asserts that managers in the Grants and Procurement Section referred Complainant's involvement in the North Cavalcade site to the Office of Regional Counsel for possible ethics violations. (Tr. 81). This initial inquiry by the Office of Regional Counsel was proper because it had the duty to advise the deputy regional administrator about ethical problems. (Tr. 82). Ms. Bell's "investigation" revealed a series of potential problems dating back to 1993, and her memorandum ended up in the hands of an OIG agent who sent the report to Mr. Waldrop. Mr. Waldrop arranged a meeting with Complainant's management as well as Ms. Harris from the Office of Regional Counsel before officially referring the matter to the OIG based on the appearance of impropriety. (Tr. 1769-70, 1875, 1890, 1910, 2178-79). Agent Mullis testified that he thought

[91] While breaking the chain of command may be the basis for discipline in other contexts, environmental whistleblowers are not obligated to follow the chain of command and cannot be discriminated against for raising concerns outside of established channels. *Saporito v. Florida Power & Light Co.*, 89 ERA 7 (Sec'y June 3, 1994).

Region 4 had acted properly in referring the case to his office for investigation. (Tr. 746-47). Because there was an appearance that Complainant was abusing her position in the Grants Section, Mr. Waldrop reassigned Complainant to the Information Management Branch during the pendency of the OIG investigation instructing her that she would no longer need her contract warrant and that she should no longer discuss contracting matters. Thus, Respondent EPA asserted legitimate nondiscriminatory reasons for its actions.

Respondent EPA's retaliatory animus is evidenced by its attempt to bias the OIG investigation by providing false information to the OIG investigator, and in failing to clarify the meaning and scope of Mr. Waldrop's instruction not to have discussion about contracts. (OIG 1, p. 14; EPA 51, p. 1). Specifically, at a joint meeting with the OIG agents, Mr. Waldrop, Ms. Harris, Ms. Maxwell, Mr. Jamison, and Mr. Springer informed the OIG agents that Complainant had a "long history of disciplinary problems." (OIG 1, p. 14). Complainant related that she had never been disciplined in her entire government career. (Tr. 2111). Mr. Mills related that Complainant had no history of disciplinary problems and he was unaware of how anyone could have made such an assertion. (Tr. 1581, 1896-99). Ms. Maxwell, Mr. Jamison and Mr. Springer were all Complainant's supervisors and they did nothing to correct the misstatement. Mr. Waldrop testified that the remark was inappropriate because it was not a correct statement, and he acknowledged that the statement would influence how the OIG would look into the investigation. (Tr. 1900, 1917). Furthermore, Mr. Waldrop stated that as the former Chief of Human Resources, he knew that EPA Region 4 only had five or six employees who fit the category of having a "long history of disciplinary problems" and Complainant was not one of those employees. (Tr. 1918).

Similarly, a retaliatory animus is evident when Mr. Waldrop failed to clarify his order not to speak about contracts. Complainant testified that she was under the impression that she was not to speak to anyone. (Tr. 2179). Complainant turned to Ms. Harris about the legality of the order, and Ms. Harris responded: "I suggest you do what they said." (Tr. 2180). Mr. Waldrop testified that the context of his instruction not to speak was not a universal "gag order," but was in relation to the suspension of her contracting warrant. (Tr. 1923). Concerned about the scope of the "gag order," Complainant sent an e-mail to Mr. Waldrop on March 15, 1995, stating that she thought it was "totally wrong and illegal that [she was] not allowed to say anything to anyone." (CX 42, p. 1). Complainant was concerned about her First Amendment rights, and her ability to defend herself from management's charges. (CX 42, p. 1). Mr. Waldrop did not respond to Complainant's e-mail. (Tr. 1921-23). In hindsight, Mr. Waldrop would have responded to explain that she was not under any type of gag order. (Tr. 1924).

Accordingly, Mr. Waldrop's and Complainant's managers' failure to affirmatively correct a known misstatement to the OIG investigator that Complainant had a long history of disciplinary problems shows retaliatory animus. Mr. Waldrop acknowledged that such a false statement would likely negatively impact the course of the OIG investigation. Likewise, I find that Mr. Waldrop had an affirmative duty to explain the scope of his order to have no discussions about contracts in light of Complainant's e-mail that demonstrated her belief that it curtailed her First Amendment rights. These two factors show that Respondent EPA intended to retaliate against Complainant for breaking

the chain of command and interfering in another Region's contract without authority.

F(3) Refusal to Disclose Results of the OIG Investigation

Respondent EPA and Respondent OIG actions in failing to disclose the results of the OIG investigation of Complainant were motivated by retaliatory animus, for different reasons, because Complainant engaged in protected activity. Complainant asserted that Respondents' actions in not disclosing the results of the investigation were done for the purpose of controlling her activities so that she would no longer break the chain of command in unilaterally interfere in other peoples business. Respondent EPA asserts that its failure to inform Complainant was merely a breakdown in communication between Complainant's managers. Mr. Waldrop assumed that Jack Sweeny, Complainant's manager at the time the U.S. attorney declined prosecution in June 1995, and at the time the investigation was closed following Mr. Waldrop's administrative action in March 1996, would have informed Complainant. (Tr. 1774). Mr. Sweeny did not testify at trial. When the adverse employment action is a failure to act, a breakdown in management communication is a legitimate nondiscriminatory reason for taking adverse employment action.

Respondent OIG asserts that it did not disclose the results of the OIG investigation because it was not the policy of the OIG and it expected the party's management to inform them of the investigative results. (Tr. 399). Additionally, Respondent OIG asserted that it did not comply with Complainant's two FOIA requests, despite its promise that it would do so once the investigation was closed, because the FOIA office was chaotic, demoralized, and the office had one FOIA specialist whose regular duties were personnel security and processing. (Tr. 915-17, 920). Eventually, the OIG obtained an experienced FOIA personnel who re-discovered Complainant's FOIA request and the OIG's promise to provide her with information on October 2, 1998. (Tr. 921; OIG 20, p. 1). Upon discovery of the omission, the OIG sent an apology letter and complied with Complainant's request on October 2, 1998. (Tr. 922-23; OIG 20, p. 1). Thus, Respondent OIG presented a legitimate nondiscriminatory reason for taking adverse employment action in that Complainant's request for information fell through the cracks because of an administrative oversight.

Complainant established by a preponderance of the evidence that Respondent EPA's failure to disclose the results of the OIG investigation were motivated by a retaliatory animus based on her protected activity in interfering in the North Cavalcade Superfund contract. On April 27, 1995, Senator Sam Nunn wrote to John Hankinson inquiring about the OIG investigation on behalf of Complainant. (CX 12 L, p. 1). Mr. Hankinson responded to another inquiry from Congressman Newt Gingrich on August 3, 1995. (EPA 57, p. 1). Complainant also spoke directly with Mr. Peyton asking when she could obtain a copy of her investigative report. (Tr. 2053-54). On September 14, 1995, Complainant sent a FOIA request for her investigative report to EPA Region 4, addressed to Mr. Hankinson. (OIG 21, p. 1). On September 15, 1995, the OIG sent Region 4 a copy of the investigative report. (OIG 10, p. 2). Mr. Waldrop concluded on March 28, 1996 that there was no basis for administrative discipline, but in light of the OIG investigation he made Complainant's reassignment to the Information Management Branch permanent. (OIG 3, p. 1). I find that Respondent EPA had an obligation to timely inform Complainant of the results of the OIG

investigation and to inform her that there was not any basis for administrative discipline. The circumstances preponderates a finding that EPA's actions were retaliatory in an effort to keep Complainant under control, to keep her out of contracting and to prevent her engaging in similar behavior such as jumping the chain of command and unilaterally interfering in the Region 6 contract.

Similarly, I find that Complainant established by a preponderance of the evidence that Respondent OIG had a retaliatory motive in taking adverse employment action against her by not timely disclosing the results of its investigation. Complainant repeatedly contacted Agent Fugger about the pendency of her case and repeatedly asked for a copy of the investigative report. (Tr. 2882-84, 2926-27, 2973). On April 15, 1995, Senator Coverdell wrote a letter to Mr. Martin at the OIG's office asking that a clarification of the OIG's findings be sent to his office. (CX 12 H, p. 1). On April 26, 1995, Complainant sent the OIG a continuing request under the Freedom Of Information Act. (OIG 17, p. 1). Although it denied her request on May 18, 1995, the OIG office promised that it would send her all portions of her file once the investigation was completed. (OIG 18, p. 1). On May 1, 1995, inquiries form Senator Coverdell were forwarded to the OIG field office. (CX 12 N, p. 1). Mr. Peyton also stated that he requested that the OIG office keep him informed of the investigation, but he never received any statement. (Tr. 2067-68).

Meanwhile, Complainant contacted OIG Desk Officer Gary Fugger in Washington, D.C. (Tr. 2878). In response to her Congressional complaints, Complainant testified that Mr. Fugger told her that she had better not try to do "anything else" stating that the OIG's office could keep the investigation open indefinitely. (Tr. 2188-89). Mr. Fugger also related to Complainant that she had better not take any more actions because her contact with Congressmen had not done her any good. (Tr. 2189-91). Mr. Fugger, predictably, denied making such statements and denied being aware of any Congressional inquiries. (Tr. 2888, 2898). On October 18, 1995, the OIG responded to Complainant's second FOIA request and again promised to send her any documents that it could released once the case was closed. (OIG 19, p. 1). Finally, on January 25, 1996, Senator Sam Nunn admonished the OIG that he had not received a response to his inquiry concerning Complainant. (CX 5, p. 1).

Although I find no evidence of collusion between Region 4 and the OIG, I find that the evidence preponderates that the OIG retaliated against Complainant for going to members of Congress concerning the OIG investigation, which concerned her protected activity in interfering with the North Cavalcade Superfund contract. Mr. Dashiell acknowledged that the overall responsibility for answering Congressional inquiries rests with the OIG and the inquiries are given a high priority. (Tr. 856, 861, 866, 937). Indeed, the role of the OIG is "to provide a means for keeping . . . Congress fully and currently informed." www.epa.gov/oigearth/role.htm (visited September 5, 2002). Agent Mullis testified that Complainant should have been made aware of the results of the OIG investigation after the U.S. attorney declined prosecution in June 1995 and the case was referred for administrative action. (Tr. 399). In light of multiple Congressional inquires, the OIG's role in responding to Congress, and the two separate promises by the OIG under FOIA to disclose information once the case was closed, I do not find the OIG's excuse of an "administrative oversight"

is credible. Based on the record as a whole, I find that the evidence preponderates that the OIG retaliated against Complainant for going to Congress. Only after the FOIA office came under new management did the OIG correct its mistake and send Complainant the investigative report on October 2, 1998, over three years form her first FOIA request and over two years form when the investigative file was officially closed.

F(4) Placing Complainant in a Job as the Information Resources Coordinator

Having determined that Respondent EPA acted with a retaliatory animus with it attempted to influence the OIG investigation by providing false information and by allowing Complainant to believe she was subject to a "gag order," her transfer to the Information Management Branch, which was part of the same series of events, is also retaliatory for her protected activities. Complainant, however, was transferred to the Information Management Branch in March 1995, and it was not until September 1996, that Complainant became the Information Resources Coordinator. (EPA 51, p. 1; EPA 78, p. 4). Complainant argued that her transfer to the Information Management Branch and the jobs she performed was all part of a scheme by management to keep her out of contracting in retaliation for her protected activity. Respondent EPA asserted a legitimate nondiscriminatory reason for Complainant's transfer and for assigning her the job of as the Information Resource Coordinator. Namely, her transfer was pursuant to the pending OIG investigation that concerned improper acts in contracting, and the Information Resource Coordinator job, a GS-12 position, became available after her initial transfer to the Information Management Branch at a time when Complainant was also a GS-12 and free to do the work.

Based on the record as a whole, I find that keeping Complainant in the position of the Information Resources Coordinator, after management became aware that she was not qualified, preponderates that Respondent EPA had a continuing retaliatory animus based on her activities in 1995. The position description mandates that Complainant is responsible, *inter alia*, for analysis and troubleshooting with regards to the delivery of contractor services. (Tr. 2220; EPA 102, p. 2). More specifically, the job required technical computer expertise because Complainant was responsible for solving computer problems. (Tr. 978; 2220-21). Mr. Barrow did not expect Complainant to become a programmer but he expected a familiarity with the approximately one-hundred basic software packages used by the Agency. (Tr. 2953-55, 2958-61). Complainant did not know anything about computers, and Mr. Place related that Complainant was the only point-of-contact personnel in his experience who did not have considerable experience in computing. (Tr. 263, 2222). Mr. Place raised his concern with Mr. Barrow, asking him to replace Complainant because her lack of knowledge made the work environment dysfunctional. (Tr. 263). Mr. Place's understanding was that Complainant was the point-of-contact because Mr. Barrow had nothing to do with her assignment and he could do nothing to change it. (Tr. 264).

Mr. Waldrop made Complainant's reassignment permanent in March 1996. (OIG 3, p. 1). Mr. Barrow knew that she occupied the position pursuant to a grievance. (Tr. 505, 508). Because upper management made a decision to keep Complainant out of contracting work in the Grants and

Procurement Sections, Mr. Barrow did not have discretion to remove Complainant from her job.[92] Mr. Barrow also knew, however, that Complainant was not qualified to perform the job as an Information Resources Coordinator as written, and he attempted to modify the position so that she could preform her duties. (Tr. 979. 2935, 2957-58; EPA 102, p. 2-5). Unfortunately, the work assignment managers whom Mr. Barrow relied on to perform the technical aspects of Complainant's job refused to work with her and their actions created a hostile work environment for Complainant. *See supra*, Section III, Part 7. Mr. Barrow was unable, or unwilling, to alleviate the hostile work environment by forcing conciliation between Complainant and the work assignment managers. Mr. Barrow did not follow Mr. Place's example of firing those individuals who refused to work with Complainant. (Tr. 275-76, 516, 2225, 2936). Accordingly, the evidence preponderates that management's retaliatory motive was perpetuated by: placing Complainant in a job that she was not qualified to perform which was outside of her career field; by refusing to remove or reassign Complainant when management had knowledge that of ignorance of computer software; and by failing to ameliorate a hostile work environment perpetuated by the work assignment managers, especially when Mr. Place informed management that Complainant's ignorance and the work environment created an organization that was totally dysfunctional from the viewpoint of EPA technical contractors.

F(5) Denial of Promotion Through Non-Selection

Based on the record as a whole, I do not find that Complainant's non-selection for jobs in the Procurement Section was motivated by a retaliatory animus. Complainant alleged that Mr. Mills and Mr. Robinson refused to hire her for a job in contracting when she was the most qualified applicant. On one particular occasion, Mr. Mills chose a person whose background was in human resources and on a second occasion, Mr. Mills chose an executive assistant over Complainant. Respondent EPA asserted legitimate nondiscriminatory reasons for Complainant's non-selection. Namely, other applicants either had the right "temperament, " were more highly qualified, their selection served administrative efficiency, the selected candidate was familiar, did quality work and was trusted, or was selected because the position was intended for a lower level employee to gain contracting experience.

Viewing the position descriptions and the application for the positions in the record, I cannot say that Complainant was more qualified to perform contracting jobs than Jeffery Napier, Fran Harrell or Charles Hays. Complainant even admitted that Charles Hays was likely more qualified to perform the job as a contract specialist. (Tr. 2265, 2268). In contrast to Complainant, Jeffery Napier and Fran Harrell were already in contracting, both had a warrant, and both had an MBA. (EPA 72-73). Complainant's background was in criminal justice and psychology, hardly areas that involve such areas as accounting, business, finance, purchasing, management, and quantitative methods. (Tr. 2092-93; EPA 77, p. 2).

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[92] Mr. Place also testified that Mr. White told him that he could not have Complainant removed from the job because she was a whistleblower. (Tr. 269).

Mr. Mills recognized, however, that Complainant has more contracting experience than Ms. Wender whom he selected for a GS12/13 contract specialist position. (Tr. 1714). Mr. Mills testified that he remembered Complainant's past behavior which included insubordination, abusive language, and inability to work with others. (Tr. 1689, 1714). With regards to Mr. Mills's selection of Sharonita Byars, there is no dispute that Complainant has more contracting experience than Ms. Byars who was a ten-year executive assistant. (EPA 86, p. 2). The vacancy notice for the position, however, provides that the "selecting official may select form any employee expressing an interest." (EPA 85, p. 1). Mr. Mills testified that Complainant was not a suitable selection because the work entailed lower graded clerical type duties. (Tr. 1713-14). Accordingly, I find that Respondent EPA offered legitimate nondiscriminatory reasons for
Complainant's non-selection, and with the presumptions and shifting burdens falling from the case Complainant is left with the ultimate burden of persuasion by a preponderance of the evidence.

Based on the record as a whole, Complainant fails to show that Respondent EPA's reasons for not selecting her for a contracting position are pretextual or that Respondent would not have taken the same adverse employment action in the absence of any protected activity. As early as 1994, there was a concentrated effort by Complainant's management to remove her from the Procurement Section and contract management. On September 16, 1993, Complainant had requested a transfer from the supervision of Mr. Mills. (EPA 25, p. 1). That request was denied on January 4, 1994. (EPA 30, p. 1). Nevertheless, Complainant was removed from her contracting duties to work on a detail in the Grants Section in July 1994, and that detail was extended in September 1994. (CX 11 C(3)(a-c)). Ms. Maxwell stated that the September detail was intended to remove Complainant from all contracting matters. (OIG 1, p. 4). Thus, at this early date there was an apparent motivation by Complainant's supervisors to keep her out of contracting. Complainant was also pursuing FLRA grievances against Mr. Mills during this time period. *See supra*, Section I, part 4. As determined *supra*, Section III, Part F(1), the motivations of Complainant's supervisors in detailing Complainant away form contracting was not to retaliate against Complainant for protected activity in environmental whistleblowing.

Evidence showing a retaliatory animus does not begin until 1995, as a result of her protected activity in interfering in the Region 6 North Cavalcade Superfund contract, when Complainant was "temporarily" transferred from the Procurement and Grants Section to the Information Management Branch by Mr. Waldrop, who also suspended her contracting warrant. (EPA 50, p. 1; EPA 51, p. 1). Mr. Waldrop had prior conversations with Mr. Mills concerning Complainant and consulted with Ms. Maxwell and Mr. Springer about Complainant's activities. (Tr. 1533-36, 1577-78; OIG 1, p. 14). Mr. Waldrop specifically told Complainant that she was not to have any discussions about contracts, no contact with EPA contractors and no access to the contract file room. (EPA 51, p. 1). Rather than transfer Complainant back into the Procurement Section after he determined that there was no basis for administrative discipline, Mr. Waldrop made Complainant's reassignment to the Information Management Branch permanent without ever telling her that the permanent assignment was not administrative discipline. (Tr. 1773-74; OIG 3, p. 1). Mr. Waldrop testified that he decided on permanent reassignment because there was a new branch chief that welcomed her assignment, a position was open, and there were no "clouds" over her head. (Tr. 1764-65). He felt that the

reassignment was in everyone's best interest because he knew that Complainant had disputes with her former supervisor in contracts and such reassignments were common to end those disputes. (Tr. 1765-66). Mr. Waldrop opined that conciliation and mediation were not options because the manager-employee relationship had broken down too much making a resolution impossible. (Tr. 1771). In other words, he made a decision to permanently keep Complainant out of contracting work because she was a trouble maker who broke the chain of command, who was outspoken and who acted unilaterally. Complainant was trouble and to keep her from doing more damage, such as her unilateral interference in the North Cavalcade contract, he wanted to keep Complainant away from contracts. It is a logical inference that Mr. Mills knew, either through management discussions, or by reviewing Complainant's job application that upper management decided to keep Complainant out of contracting, and as a lower level manager, Mr. Mills would be expected to follow the decisions of his supervisors.

Mr. Mills, however, was not part of the management team concerned with Complainant's interference with the North Cavalcade contract in 1995, and he was not involved in the initial referral to the OIG for investigation. Rather, I find it more plausible that Mr. Mills retaliatory motive, if any, stemmed from Complainant's filing of grievances against him and his apparent inability to exercise management authority over Complainant. Mr. Mills simply did not want to work with a person who had specifically requested as a remedy in her FLRA complaint that she no longer work under his supervision. Therefore, I find that Complainant failed to establish by a preponderance of the evidence that Mr. Mills's non-selection of her was motivated by a retaliatory animus for her engagement in protected activity.

F(6) Hostile Work Environment

As discussed *supra*, Section III, Part 7, Complainant was the subject of an adverse employment action in the form of a hostile work environment. First, because Respondent EPA refused to disclose the results of the OIG investigation forcing Complainant to live with the nagging doubt about whether she would be subject to criminal and/or administrative action which could result in a loss of liberty or means of economic support. Not disclosing the results of the investigation acted as a control mechanism for management to curtail Complainants predisposition to be outspoken, to go outside the chain of command and act unilaterally. Depriving Complainant of information concerning the OIG investigation provided a means to keep Complainant from contesting her removal from contracting and provided a means to keep Complainant in the Information Management Branch. Mr. Place testified that both Mr. Barrow and Mr. White stated that management could not remove Complainant form her job as the Information Resources Coordinator because she was a whistleblower. (Tr. 264, 269).

Respondent EPA offered no legitimate nondiscriminatory reason for subjecting Complainant to a hostile work environment, rather, Respondent EPA argued that there was no hostile work environment. Nonetheless, Complainant must still establish by a preponderance of the evidence that the hostile work environment was motivated by a retaliatory animus for engaging in protected

activity. *See Hicks*, 509 U.S. at 517-18. Based on Complainant's *prima facie* showing of retaliation, and the Court's holdings management's actions in: not disclosing the OIG investigation, placing Complainant in a job that she was not qualified to perform, and in not ameliorating the work conditions perpetuated by her work assignment managers, I find that the evidence preponderates a finding that this instance of hostile work environment was motivated by a retaliatory animus.

The hostile work environment perpetuated by the work assignment managers in refusing to work with Complainant in her job as the information resource coordinator, however, was not motivated by a retaliatory animus. There is no evidence that any work assignment manager knew of Complainant's protected activities. Rather, the motivation of the work assignment managers likely stemmed from Complainant's ignorance about contracting and her difficulty in communicating with other employees as related by Mr. Barrow. (Tr. 983-86).

G. Timeliness of Complaints

A whistleblowing complaint alleging discrimination under federal employee protection statutes must file a complaint within thirty days of the occurrence of an adverse employment action 29 C.F.R. § 24.3(b) (2002); *Erickson v. United States Environmental Protection Agency*, ARB No. 99-095, p. 4-5, n.4 (ARB July 31, 2001). "Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980); *Prybys v. Seminole Tribe of Florida*, 95 CAA 15 (ARB Nov. 27, 1996) (stating that the brief filing period in environmental whistleblowing was the mandate of Congress and the limitations cannot be disregarded because it bars what might otherwise be a meritorious case). Discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. - -, 122 S. Ct. 2061, 2072-73 (2002); *United Air Lines Inc., v. Evans*, 431 U.S. 553, 558 (1977) (finding that acts falling outside the prescriptive period may constitute relevant background evidence where current conduct is at issue).

Prescriptive periods are, however, subject to equitable doctrines such as estoppel, tolling and waiver. *Morgan*, 122 S. Ct. at 2076. Equitable estoppel focuses on whether the employer misled the complainant, and thereby, caused a delay in filing a complaint and equitable tolling focuses on whether a complainant was excusably ignorant of his or her rights. *Prybys v. Seminole Tribe of Florida*, 95 CAA 15 (ARB Nov. 27, 1996). Equitable tolling is also available when a complainant files a timely complaint raising issues sufficient to state a cause of action under environmental whistleblowing laws, but files the complaint in the wrong forum. *Biddel v. Department of the Army*, 93 WPC 9 (ALJ July 20, 1993). Also, unlike discrete acts, hostile work environment claims by nature are a continuing violation without any single act necessarily being actionable in its own right. *Morgan*, 122 S. Ct. at 2074.

Outside of hostile work environment claims, the Supreme Court ended the continuing violation theory developed by the lower courts to boot strap adverse employment actions into the

prescriptive period. *Morgan*, 122 S. Ct. at 2072-73. In particular, the Ninth Circuit had developed a theory whereby an employer commits a "serial violation" if the alleged employment actions occurring before the statutory time limit are sufficiently related to those occurring within the statutory time limit and the acts are more than isolated, sporadic and discrete. *National Railroad Passenger Corp. v. Morgan*, 232 F.3d 1008, 1015 (9th Cir. 2000). The Court determined that the "serial violations" theory contradicted the plain language of the statute which provided that a complaint "shall be filed" within the statutory prescriptive period. *Morgan*, 122 S. Ct. at 2070. A discrete retaliatory act "occurs" on the day it happens and the complaint must be filed within the statutory time frame based off the happening of that event. *Id*. at 2070-71. Thus, discrete retaliatory acts are not actionable if time barred even when they are related to acts that fall within the prescriptive period. *Id*. at 2072. On the other hand, the determination of when a hostile work environment adverse employment action "occurs" is by definition continual and may "occur" over a period of years, and a single act of harassment may not be actionable on its own. *Id*. at 2073. "Provided that an act contributing to the claim occurs within the filing period, the entire time period of hostile environment may be considered by a court for the purposes of determining liability." *Id*. at 2074.

Complainant filed her first complaint on April 8, 1998, alleging hostile work environment and other retaliatory acts by Respondent EPA for her activity that: "expos[ed her] supervisors' lack of knowledge about both legal/contractual and scientific issues, [that] threatened to open up demonstrated problems with EPA's regulations and analytical methods to public scrutiny through the courts" in relation to the Southeastern Superfund contract and her later interference in the Region 6, North Cavalcade Superfund contract. The April 8, 1998 complaint was filed after Complainant received notification that she was denied a promotion on March 10, 1998. Additionally, Complainant alleged retaliation on behalf of Respondent OIG for keeping a criminal investigation pending over her head and denying her FOIA request for the investigative report.

On September 1, 1998, Complainant filed a second whistleblowing complaint alleging retaliation in the form of a continuing hostile work environment, the issuance of an August 5, 1998 written warning, and denial of promotion. This was followed by a third whistleblowing complaint on February 20, 2000, alleging a continued hostile work environment and post-complaint retaliation. Specifically, Complainant alleged that she was subjected to a "din of concerted hostile remarks by EPA employees" after an Information Management Branch meeting where remarks were directed at a "supposedly unknown person who 'leaked' memos to a Congressional committee regarding destruction of e-mail by EPA to foil FOIA requesters." On May 19, 2000, Complainant filed a fourth whistleblowing complaint alleging retaliation in the form of a denial of flexiplace on April 20, 2000 and May 9, 2000.

On July 19, 2000, Complainant filed a fifth whistleblower complaint alleging a continuing hostile work environment in the form of denying Complainant paid leave for work on her whistleblowing litigation, ex-parte contacts, threatening insubordination for not returning documents to work, directing Complainant to turn over copies of documents that are potentially discoverable evidence circulating information and disinformation about Complainant's whistleblower litigation to Complainant's colleagues, and engaging in surveillance of Complainant's office which Complainant

first learned of on June 22, 2000.

On May 16, 2001, Complainant filed a sixth whistleblower complaint[93] alleging retaliatory acts of a denial of flexiplace based on the fact that Complainant did not have enough work to do, non-selection for jobs within her career field, and "idling" of Complainant by not assigning her any meaningful work, and humiliating her in her job duties. On June 23, 2001, Complainant filed a consolidated complaint, her seventh, and on August 3, 2001, Complainant field an eighth whistleblowing complaint alleging non-selection in favor of a secretary to fulfill a 120 day contracting detail, which was later consolidated in a ninth consolidated whistleblowing complaint on November 21, 2001.

Subsequently, Complainant filed a tenth whistleblower complaint on December 5, 2001, of theft and blacklisting alleging theft of documents from Complainant's office and stigmatization of Complainant by an EPA attorney after a discovery conference call with the Court. Complainant filed a final eleventh whistleblowing complaint on April 19, 2000, following Respondent's offer of settlement, alleging continuing violations "in the form of ongoing efforts to get her to do something for which Respondent could fire her, intimidation of her counsel by filing a bad faith disqualification motion, and abuse of the DOL settlement judge process, including an 'offer' to pay Ms. Erickson some $13,000 to retire early" and subjecting her to a "gag order." Complainant further alleged that Respondents forced Complainant to violate the anti-deficiency act by telling her to spend money and incur expenses not yet committed, and worked to undermine her authority.

Accordingly, as Complainant filed a timely complaint in relation to the non-disclosure of the OIG investigative report and, because I found that Complainant has been subject to a hostile work environment since March 10, 1995, she filed a timely complaint which included the initiation of the OIG investigation, and continuing through the present day in that management has placed her in a job that she is not qualified to perform knowing that the key people she relied upon to perform that job would not work with her and refusing to transfer her back to her career field in contracting.

H. Conclusion

Complainant was a credible witness. Her protected activity that touched on subjects related to the pertinent statutes included: interfering in the North Cavalcade Superfund project to correct a faulty performance standard, and writing to Congress in an attempt to resolve the OIG investigation initiated against her for her activities in interfering in the North Cavalcade Superfund project. Because of her protected activity, Respondent EPA subjected Complainant to adverse employment action that was a serious and material alteration of either the terms, conditions, or privileges of her employment. Specifically, Respondent EPA: cancelled Complainant's contracting warrant;

[93] In her June 23, 2001 consolidated complaint, Complainant states that she filed additional complaints on June 26, 2000, August 9, 2000, August 30, 2000, September 29, 2000, November 15, 2000, and March 4, 2001.

transferred her from her career field; allowed her to believe that she was subjected to a gag order; referred her case to the OIG based on misinformation concerning her disciplinary history ; confiscated documents that she needed to help clear her name; declined to disclose the results of the OIG investigation and administrative review; and placed her in a job that she was not qualified to perform while refusing to remedy the situation when her technical ignorance created a dysfunctional organization from the point of view of private contractors, and contributed to the hostility directed toward her by her work assignment managers. These same actions taken by Respondent EPA form the basis of adverse action in the form of a hostile work environment. The hostile work environment was regular and pervasive because each day that passed without informing Complainant about the results of the OIG investigation left Complainant with the lingering doubt about her continued liberty and economic prosperity. Similarly, management perpetuated the hostile work environment by transferring Complainant out of her career field and placing her in a position as the Information Resources Coordinator, a job for which she was only qualified in part, while refusing to remove her from this position based on her status as a whistleblower. Also, management allowed the perpetuation of a hostile work environment created by Complainant's work assignment managers, that subjected Complainant to ridicule and insult, because management wanted to keep Complainant in that job based on her status as a whistleblower.

Complainant's supervisors had knowledge of her protected activity and although Respondents articulated legitimate non-discriminatory reasons for taking the adverse employment action, the evidence preponderates that Respondents were motivated by a retaliatory animus in: canceling Complainant's contract warrant, transferring her to the Information Management Branch, initiating on OIG investigation, issuing a "gag order," "stealing" Complainant's work documents, failing to disclose the results of the OIG investigation, continuing to keep Complainant in a position as the Information Resources Coordinator, and subjecting her to a hostile work environment.

Non-disclosure of the OIG investigation was an adverse employment action that "occurred" for Respondent EPA when the OIG referred the investigative report back to Region 4 for administrative action after it found no basis for criminal proceedings, and stopped "occurring" when it informed Complainant of the investigative results in February, 2000. Likewise, non-disclosure of the OIG investigative was an event that "occurred"over a long period of time for Respondent OIG. The event started once the investigation was officially closed on May 16, 1996, if not sooner, and ended when the OIG complied with Complainant's FOIA request on October 2, 1998. Complainant timely filed complaints that covered the event of Respondents' non-disclosure of the OIG investigative file. Respondent EPA also undertook an adverse employment action that "occurred" over a long period of time in that it subjecting Complainant to a hostile work environment. Complainant's hostile work environment motivated by a retaliatory animus for engaging in protected activity began on March 10, 1995, and is ongoing. Complainant timely filed a complaint covering this adverse employment action.[94]

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[94] Complainant failed to establish that putting her on "display," "shunning," and the issuance of a written warning constituted adverse employment actions when considered independently. Likewise, I determined that the "din of hostile remarks" during a regularly

IV. DAMAGES

Damages for environmental whistleblowing are provided by statute: WPCA, 33 U.S.C. § 1367(b) (providing that the Secretary may order the party committing the violation to take "affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee . . . to his former position with compensation."); SWDA, 42 U.S.C. § 6971(b) (same); CERCLA, 42 U.S.C. § 9610(b) (same); CAA, 42 U.S.C. § 7622(b)(2)(B) (providing the Secretary may order that the violator take affirmative action to abate the action, reinstatement with the original terms, conditions, and privileges of employment, and compensatory damages); and SDWA, 42 U.S.C. § 300j-9(i)(2)(B) (providing that the Secretary may order affirmative action to abate the violation, reinstatement to the complainant's former position together with the terms, conditions, and privileges of his employment, compensatory damages, and "where appropriate, exemplary damages."). Accordingly, Complainant is limited by statute in her recovery to affirmative action, reinstatement, compensatory damages, and exemplary damages if appropriate. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 289-90 (6th Cir. 1983) (finding that the Secretary cannot order any type of relief that the Secretary deems appropriate, rather the Secretary is limited to the formulation of a complete and proper remedy without the creation of novel benefits), *abrogated on other grounds in McDaniel v. U.S.*, 970 F.2d 194, 196-97 (6th Cir. 1992) (referencing *DeFord's* discussion of FECA).

A. Reinstatement

An employees reinstatement to his or her former job is a favored remedy for whistleblowing

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scheduled branch meeting that briefly touched on an unknown Congressional informant concerning the destruction to FOIA records was adverse employment action. Nor did Mr. Barrow's denial of flexiplace privileges create an actionable adverse employment action. Furthermore, Complainant failed to show that Respondent EPA's "blacklisting," "stigmatization," and Respondents' "bad faith" settlement offer constituted adverse employment action.

Complainant also failed to meet her burden in showing that Respondent EPA acted with a retaliatory motive in 1993 concerning Complainant's demotion, transfer, reassignment of work, and denial of a promotion. Likewise, Complainant failed to establish that her denial of promotion through non-selection was motivated by retaliatory animus and failed to show that the hostility directed toward her by the work assignment managers was based on a retaliatory animus.

On a related note, Complainant never sufficiently established that Mr. Barrow's denial of administrative leave to attend OSHA meetings was adverse employment action or motivated by a retaliatory animus.

discrimination. As Judge Vance form the Eleventh Circuit stated:

> When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. Yet at the same time, there is a high probability that reinstatement will engender personal friction of one sort or another in almost every case in which a public employee is discharged for a constitutionally infirm reason. Unless we are willing to withhold full relief form all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement. We also note that reinstatement is an effective deterrent in preventing employer retaliation against employees who exercise their constitutional rights. If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is, of course, less incentive to use employment decisions to chill the exercise of constitutional rights.

Allen v. Autagua Count Board of Education, 685 F.2d 1302, 1306 (11th Cir. 1982). *See also Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322 (11th Cir. 1999) (same).

Reinstatement is required in lieu of front pay absent a showing that a normal working relationship is impossible or that the employee has an actual medical risk that prevents performance of the former job. *Creekmore v. ABB Power Systems, Inc.*, 93 ERA 24, p. 3 (Dep. Sec'y April 10, 1996). A Court should only reinstate an employee to a higher position if the record supports a finding that the employee is qualified and would have received a promotion in the absence of protected activity. *Pecker v. Heckler*, 801 F.2d 709, 712-13 (4th Cir. 1986).

Here, Mr. Mills stated that he would be able to work with Complainant just as he would any other employee and reinstatement to the job she held prior to March 1995 is the appropriate remedy. Although Complainant was on a detail from the Procurement Section to the Grants Section and demoted to a contract specialist on the Southeastern contract, her regular duties were as a contract officer in the Procurement Section. Reinstatement as a contract officer entails reinstatement of all the terms, conditions, and privileges of employment, thus, Complainant is entitled to have her former contracting warrant reinstated.

Complainant attempted on several different occasions to obtain a promotion from a GS-12 to a GS-13 prior to March 1995 - the date Respondent EPA began retaliating against Complainant for engaging in protected activity - but was unsuccessful. Complainant was twice denied a desk audit promotion to a GS-13 after she had conflicts with Mr. Mills over how to document a file and he reassigned her work. In seeking a promotion based on competitive selection, however, Complainant was ranked as "highly qualified" or "qualified" for GS-13 positions. Had Complainant stayed in the Procurement and Grants Sections, instead of working as the Information Resource Coordinator which had no promotion potential, I find that she would have received a promotion to a GS-13. Thus, I find that Respondent EPA must reinstate Complainant as a GS-13 contract officer.

In the alternative, should both Respondent EPA and Complainant agree that reinstatement is not the desired remedy, Complainant is entitled to front pay, at the GS-13 level, and service credits so that Complainant will have thirty years of government service and be eligible for the same retirement package as if she had worked for the government for thirty years.

B. Back Pay

Having determined that Complainant is entitled to a promotion to a GS-13, I find that the effective date of that promotion is March 10, 1995. Complainant is entitled to timely step increases form March 10, 1995 to the date this Order is issued. Complainant is also entitled to interest on the amount of overdue back pay calculated in accordance with the rate employed by the United States District Courts under 28 U.S.C. § 1961.

C. Compensatory Damages

"Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.*, ARB No. 98-166 (ARB Feb. 9, 2001). Although a complainant may support his claim for compensatory damages with medical and psychiatric experts, it is not required. *Mosbaugh v. Georgia Power Co.*, 91 ERA 1 (Sec'y Nov. 20, 1995). A complainant need only show that he suffered mental pain or suffering that was caused by his employment. *Crow v. Noble Roman's, Inc.*, 95 CAA 8 (Sec'y Feb. 26, 1996). Even if the complainant had other sources of stress outside his employment, the employer must still compensate the complainant for aggravating the preexisting stress. *Doyle v. Hydro Nuclear Services*, 89 ERA 22 (ARB Sept. 6, 1996). No upper limit exists in awarding compensatory damages, but the ALJ should make such awards with reference to awards in other discrimination related statutes, including Title VII. *Leveille v. New York Air National Guard*, ARB No. 98-079 (ARB Oct. 25, 1999). Accordingly, a review of recent awards in discrimination decisions is instructive in determining what Complainant is entitled to under the facts of this case.

In *Smith v. Esicorp*, ARB No. 97-065 (ARB Aug. 27, 1998), the ARB reviewed a number of cases awarding compensatory damages for emotional distress:

> *Van der Meer v. Western Kentucy University*, ARB Case No. 97-078 (ARB Dec., Apr. 20, 1998). The ARB awarded Van der Meer $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.
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> *Gaballa v. The Atlantic Group*, 94-ERA-9, p. 5 (Sec'y Dec., Jan 18, 1996). Gaballa had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary reviewed the compensatory damages

awards for mental and emotional suffering made in a number of cases, which ranged form $10,000 to $50,000, and awarded Gaballa $35,000.

Creekmore v. ABB Power Systems energy Services, Inc., 93-ERA-24, p. 25 (Dep. Sec'y Feb. 14, 1996). The Deputy Secretary awarded Creekmore $40,000 for emotional pain and suffering caused by a discriminatory layoff. Creekmore showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company.

Michaud v. BSP Transport, Inc., ARB No. 97-113, p. 9 (ARB Oct. 9, 1997). The ARB awarded $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist. Evidence also showed foreclosure on Michaud's home and loss of savings.

Smith v. Littenberg, 92-ERA-52, p. 7 (Sec'y Dec., Sept. 6, 1995). The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional stress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems."

Blackburn v. Metric Constructors, Inc., 86-ERA-4, p. 5 (Sec'y Aug. 16, 1993). The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.

Bigham v. Guaranteed Overnight Delivery, ARB No. 96-108, p. 3 (ARB Sept. 5, 1997). The ARB awarded Bigham $20,000 for mental anguish resulting form discriminatory layoff.

Lederhaus v. Paschen, 91-ERA-13, p. 10 (Sec'y Oct. 26, 1992). The Secretary awarded Lederhaus $10,000 for mental distress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted.

In Addition to the cases mentioned in *Smith*, I note the following cases:

In *Martin v. Department of the Army*, ARB No. 96-131, p. 17-18 (ARB July 30, 1999), the ARB affirmed an award of $75,000 for severe emotional distress when the complainant had several years of counseling, and symptoms of fatigue, malaise, depression, difficulty sleeping, bronchial irritation, suicidal thoughts and low self-esteem due to stress that was related in part to the

employer's retaliatory acts.

In *Pickett v. Tennessee Valley Authority*, 2001 CAA 18, p. 52-53 (ALJ Feb. 7, 2002), the ALJ determined that $5,000 in compensatory damages were warranted when the complainant did not show actual damage but the respondent harmed the complainant's reputation in a publication. The ALJ noted that a small compensatory amount was appropriate considering the limited intensity, severity and duration of the complainant's distress.

In *Beliveau v. Naval Underseas Warfare Center*, 1997 SWD 1 (ALJ June 29, 2000), the ALJ recommended an award of $50,000 in compensatory damages for emotional distress. Complainant had presented expert testimony, but the ALJ found that it was of limited probative value. In setting the amount of the award, therefore, the ALJ looked at cases in which amounts were awarded for emotional distress without expert evidence in support. He then set the amount at the high end of that range ($20,000 to $50,000) because, despite the limited weight given to the expert's opinion, it was more probative than a complainant's mere conjecture.

In *Hobby v. Georgia Power Co.*, ARB No. 98-166 (ARB Feb. 9, 2001), the ARB adopted the ALJ's recommendation for $250,000 in compensatory damages based on the fact that the respondent subjected the complainant to a series of minor slights that were a precursor to much larger problems. The complainant experienced difficulty in finding work in his chosen profession, experienced emotional distress due to depleted finances, and suffered from a loss of reputation. After complainant's termination, his career was largely destroyed.

In *Miglore v. Rhode Island Department of Environmental Management*, 99 SWD 1, p. 52 (ALJ Aug. 13, 1999), the ALJ recommended compensatory damages in the amount of $400,000 based upon the complainant's mental anguish, adverse health consequence, and damage to her professional reputation. The ALJ noted that this award was higher than any other award previously awarded by an administrative law judge, but found that the case presented a fact scenario so severe as to warrant significant compensatory relief. The complainant presented a compelling case of repeated and continuous discrimination and retaliation that compromised her mental health, and professional reputation.

In this case, Respondents' left Complainant to suffer the lingering doubt, of whether the OIG investigation would result in a loss of liberty and/or means of economic support, from May 15, 1996, to October 2, 1998. Respondent EPA also permanently transferred Complainant out of her career field, subjected her to a hostile working environment, and allowed her to suffer in a position that she was not fully qualified to perform while she attempted to manage personnel who refused to work with her. Complainant's psychiatrist causally connected Complainant's stress to Respondent EPA's retaliatory activities and Complainant testified as to how the stress adversely affected her health. Accordingly, I find compensatory damages in the amount of $50,000 is appropriate.

D. Affirmative Action

Complainant requested numerous forms of equitable relief. By statute the Secretary of Labor has authority to take affirmative action to abate violations of environmental whistleblower laws. WPCA, 33 U.S.C. § 1367(b); SDWA, 42 U.S.C. § 6971(b); CERCLA, 42 U.S.C. § 9610(b); CAA, 42 U.S.C. § 7622(b)(2)(B); SDWA, 42 U.S.C. § 300j-9(i)(2)(B). On May 15, 2002, President Bush signed the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 into law. Pub. L. 107-174, 116 Stat. 566 (107th Cong.), *amending* 5 U.S.C. § 2301 *et seq.* The "No Fear" Act requires federal agencies to "be accountable for violations of anti-discrimination and whistleblower protection laws." H.R. 169 (May 15, 2002). In part, the new Act calls for written notification of the rights and protections available to Federal employees, an annual accounting to Congress for the agency's actions, and a public posting of complaints filed with the agency.

I find that the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 partly addresses Complainant's need for equitable relief. Respondent EPA shall abate its retaliatory conduct by removing Complainant from her current job and reinstating her as a contract officer. Respondents' abated their retaliatory act of non-disclosure of results in the OIG investigation once Complainant had actual knowledge and proof that she was cleared of any wrongdoing.

I also find that Complainant is entitled to a thirty day notice posting in a public place within the Procurement and Grants Sections. The notice shall contain a short summary of these proceedings, specifically providing that: 1) Complainant attempted to prevent government waste and abuse by informing officials in Region 6 that a Superfund contract set for bid contained defective performance specifications; 2) Complainant actions were appropriate and commendable; and 3) as a result of Complainant's actions, she was transferred form her career field, investigated by the OIG, and not informed that neither the OIG nor EPA Region 4 found any basis for criminal or administrative discipline. The notice shall also contain an affirmative statement that EPA Region 4 recognizes that environmental whistleblowing is an important federally protected activity, that it shall make every effort to ensure that those who engage in environmental whistleblowing are not retaliated against, and that it recognizes that those who engage in whistleblowing activity are not obligated to follow the chain of command.

E. Exemplary Damages

The SDWA permits the imposition of exemplary damages when appropriate. 42 U.S.C. § 300j-9(i)(2)(B). Exemplary damages are appropriate "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983). Exemplary damages serve to punish illegal conduct, deter its repetition and are set according to the degree that the respondent's conduct is reprehensible. *BMW v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Factors in determining whether punitive damages should be awarded and in what amount include: 1) The degree of the defendant's reprehensibility or culpability,

2) the relationship between the penalty and the harm to the victim caused by the respondent's actions, 3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35, 121 S. Ct. 1678, 1684-85, 149 L. Ed 2d 674 (2001) (citations omitted). Other courts found punitive damages appropriate in the following cases:

In *Varnadore v. Oak Ridge National Laboratory*, 92- CAA-2, 5 and 93-CAA-1 (ALJ June 7, 1993), the ALJ found that compensatory damages for stress caused by the Respondent's having deliberately created a hostile work environment for the Complainant were warranted in the amount of $10,000. The ALJ also concluded that the Respondent "intentionally put [the Complainant] under stress with full knowledge that he was a cancer patient recovering after extensive surgery and lengthy chemotherapy" and recommended an award of $20,000 in exemplary damages.

In *Jayco v. Ohio Environmental Protection Agency*, 1999-CAA-5 (ALJ Oct. 2, 2000), the ALJ recommended an award of exemplary damages of $45,000, based on his finding that Respondent referred an allegation of theft to the state police related to a meal voucher submitted by Complainant based on an intent to harm Complainant's investigatory function and his reputation. The ALJ earlier in the opinion found that the dispute over the meal voucher was, at most, over a *de minimus* amount of money and an innocent error by Complainant, and that the extraordinarily harsh suspension of Complainant, who had a good work record, and referral of the matter to the state police (which declined to investigate as the amount in dispute was less than $10) could only be explained as retaliation for Complainant's protected activity.

In *Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3-4 (ARB Oct. 25, 1999), the ALJ recommended that punitive damages be denied, finding that when Respondent made two negative references about Complainant in response to reference checks, it did not act with reckless or callous disregard of Complainant's rights. The ARB agreed and adopted the ALJ's recommendation, finding that the record did not show that the persons who had given the negative references did so with the purpose or intent to harm Complainant or with reckless disregard for her rights.

In *Sayre v. Alyeska Pipeline Service Co.*, 1997-TSC-6 (ALJ May 18, 1999), the ALJ recommended an award of $5,000 in punitive damages where he found that both Respondents intentionally discriminated against Complainant because she engaged in protected activity, and Complainant was harassed, lost her job, and suffered mental and emotional stress as a result. The ALJ moderated the recommended punitive damage award because he found that the alleged statements concerning future discrimination were unclear at best, and because of the mitigating fact that Complainant was eventually rehired.

In *Pickett v. Tennessee Valley Authority*, 2001 CAA 18, p. 52-53 (ALJ Feb. 7, 2002), the ALJ determined that the respondent acted egregiously in intentionally degrading the complainant, casting aspersions on his honesty, blacklisting, and discouraging future employment relations. The duration and frequency of respondent's environmental violations was not significant, however, and awarded $10,000 in exemplary damages.

In *Lambert v. Fulton County Georgia*, 253 F.3d 588 (11th Cir. 1002), the Eleventh Circuit upheld an award of $50,000 in compensatory damages and $225,000 in punitive damages when white employees alleged the county managers and EEO officer discriminated against them because of their race in failing to ameliorate a hostile work environment that was present form 1995 to 1996.

In *U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000), the Eleventh affirmed a punitive damage award of $100,000 when the employer acted in reckless indifference to the rights of pregnant employees by terminating their employment. The $100,000 award was the maximum allowed under the cap set in 42 U.S.C. § 1981a(b)(3)(B).

I find that Respondents' conduct in not disclosing the results of the OIG investigation and Respondent EPA's conduct in permanently transferring Complainant out of her career field, subjecting her to a hostile working environment, and allowing her to suffer in a position that she was not fully qualified to perform while she attempted to manage personnel who refused to work with her was reprehensible. I also note that Respondents' behavior took place over a long period of time. Based on a review of the above cited cases, and the facts in this case, I award punitive damages in the amount of $225,000.

F. Attorney's Fees and Costs

Attorney's fees are available to the prevailing Complainant as authorized by statute. SDWA, 42 U.S.C. § 300j-9(i)(2)(B); WPCA, 33 U.S.C. § 1367(c); SWDA, 42 U.S.C. § 6971(c); CAA 42 U.S.C. § 7622(b)(2)(B); and CERCLA 42 U.S.C. § 9610. No award of attorney's fees for services rendered on behalf of the Complainant is made herein since no application for fees has been made by the Complainant's counsel. Counsel is hereby allowed thirty (30) days form the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Complainant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE: This Recommended Decision and Order will automatically become the final order

of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W. Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).